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IN THE

Supreme Court of the United States

October Term, 1968.

No. 1370

ALEXANDER H. LINDSAY,
Appellant,

v.

JOSEPH J. KELLY, JR.,
Secretary of the Commonwealth of Pennsylvania,
Appellee.

JURISDICTIONAL STATEMENT.

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Appellee.

JURISDICTIONAL STATEMENT.

And now comes the Appellant above named by his counsel, and under and in pursuance of Rule 15 of the Rules of the Supreme Court makes the following Jurisdictional Statement:

I. ORDER OF SUPREME COURT OF PENNSYLVANIA FROM WHICH APPEAL ARISES.

(a) This appeal arises from judgment of the Supreme Court of Pennsylvania in *Irvin Stander and Alexander H. Lindsay v. Joseph J. Kelley, Jr., Secretary of the Commonwealth of Pennsylvania, No. 38,* which opinion and judgment were rendered and entered February 7, 1969. The Opinion of the Court, together with the concurring opinion of Justice Roberts and the dissenting opinion of Justice Cohen,

appear hereinafter as Appendix A(1), A(2) and A(3), respectively and are reported at 433 Pa. 406.

II. GROUNDS FOR JURISDICTION.

(a) Statutory Authority.

This is a proceeding on appeal from a judgment of the Supreme Court of Pennsylvania holding that a legal enactment and constitutional amendment under the laws of Pennsylvania was not repugnant to the Constitution of the United States. This appeal is taken under and pursuant to Section 1257(2), 28 U. S. C. A. as follows:

> "1257. *State Courts—Appeal—Certiorari*—Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

(b) Nature of the Proceeding.

This action challenges as contrary to federally guaranteed rights, an Act of the Pennsylvania Legislature authorizing non-elected delegates to participate in a limited constitutional convention for amending the State Constitution. This action challenges, moreover, the conduct of delegates to the State Constitutional Convention in exceeding the authority purportedly given by the legislation in question. The legislation and conduct which followed it have denied to the citizens of Pennsylvania rights guaranteed by the due process and equal protection requirements of the fourteenth amendment to the Federal Constitution.

On March 15, 1967 the General Assembly of the Commonwealth of Pennsylvania approved Act No. 2 which required submission to the electorate of a proposal to call a constitutional convention. The Act provided for 163 convention delegates. Only 150 were to be elected; the other 13 were non-elected delegates to serve by reason of the legislative office already held by them. In providing for these 13 ex-officio delegates with full voting power, the Legislature of Pennsylvania predetermined to disfranchise almost a million Pennsylvania electors. The weight of $^{13}/_{150}$th or 8.67% of Pennsylvania's voters was eliminated. In addition, this preconstituted a militant nucleus of legislative chiefs to persuade, maneuver and which did control the entire convention. Federal guarantees of due process and equal protection were shattered by the mere existence of this specially interested corps of legislators.

It is not the existence alone of this non-elected elite, of which appellant complains. In their excessive interest in protecting and enhancing the power of the legislature, this group has upset Pennsylvania's tripartite form of government and eliminated a constitutional guarantee of jury trial in civil cases. To do this the delegates had to completely disregard the limited purpose for which they were called. The convention's authority to consider the judiciary was limited to matters involving administration and organization of the courts, and the selection and tenure of judges, only. The convention usurped public authority and intruded upon the jurisdiction of the Pennsylvania Supreme Court by making the Court's jurisdiction subject to the will of the Legislature and eliminated the right to jury trial in civil cases.

Because of Pennsylvania's failure to afford the guarantees of due process and equal protection, she may no longer boast of a constitutionally protected tripartite gov-

ernment and an independent judiciary. Article V, Section 10(c), of the Amended Constitution denies to the Pennsylvania Supreme Court the right to review legislation dealing with the jurisdiction of that or any court.

As a protection against short-term popular whim, the State Constitution required that constitutional amendments be (1) passed by two legislatures; (2) advertised three months before the election of the second legislature and three months before the general vote; and (3) voter approved. Act No. 2 ignored these mandatory constitutional safeguards without excuse.

In the 94 years of its existence, the Pennsylvania Constitution has been changed by these mandatory procedures on numerous occasions. As recently as May 16, 1967 nine articles were amended, involving more than 60 sections, 5 were entirely new. As a wholly inadequate substitute and without reasonable notice to the electorate, the Pennsylvania Legislature has tried by Act No. 2 to raise itself by its bootstraps to the level of a constitutional convention by changing the method of amendment.

Dissatisfied with their Constitution and unwilling to follow the constitutionally mandated method of amending it, the Pennsylvania legislature passed Act No. 2. Thereby the protections of constitutional government were circumvented and the electors of Pennsylvania were required to vote a constitution with only 18 days within which to become informed.

It is no answer, as cynics suggest, that voters who were interested took the time and trouble to cast an informed ballot. These convention proposals covered over 9,500 words in a document which will never be noted for its simplicity. The flagrantly reduced time during which Pennsylvania electors could inform themselves of its content is patently contrary to the due process requirements of the fourteenth amendment.

(c) Time for Filing Appeal.

The time of appeal is submitted to be governed by Title 28, Section 210(c), U. S. C. A.

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period of time not exceeding sixty days."

(d) Applicable Proceedings in the Courts of Pennsylvania and the Dates Thereof Are as Follows:

1. Complaint in Equity requesting that the election be rstrained and other appropriate relief filed in the Court of Common Pleas, Dauphin County, Pennsylvania, April 11, 1968.

2. Order of Dauphin County Court Denying Preliminary Relief entered April 11, 1963.

3. Order of the Supreme Court of Pennsylvania affirming the denial of preliminary relief without prejudice entered October 11, 1969. Majority, two Concurring and Dissenting Opinions, appendix B1, B2, B3 and B4, respectively, reported at 432 Pa. 1, 246 A. 2d 649.

4. Plaintiff's Amended Complaint Limiting Challenge to Amendments of Judiciary Article was filed November 8, 1968.

5. Order of Dauphin County Court Denying Permanent Relief dated November 26, 1968.

6. Order of Supreme Court of Pennsylvania Affirming Judgment of Dauphin County Court Denying Permanent Relief—Order dated February 7, 1969. Majority, Concurring and Dissenting Opinions, Appendix A1, A2 and A3, respectively, reported at 433 Pa. 406.

7. Notice of Appeal was filed and copies served on parties and counsel pursuant to Rules 10 and 33 on April 25, 1969. Appendix C.

(e) Cases Believed to Sustain Jurisdiction of This Court Are as Follows:

1. On Issue of Ex-Officio Delegates:

Baker v. Carr, 369 U. S. 186, 82 S. Ct. 691;
Gray v. Sanders, 372 U. S. 368, 83 S. Ct. 801;
U. S. v. Carolene Products Co., 304 U. S. 144, 58 S. Ct. 778;
Traux v. Corrigan, 257 U. S. 312, 42 S. Ct. 124 (1921);
Wheeling Steel v. Glander, 337 U. S. 562, 69 S. Ct. 1291 (1949);
Snyder v. Commonwealth of Mass., 291 U. S. 97, 54 S. Ct. 330 (1934);
Chicago, Burlington and Quincy Rd. Co. v. Chicago, 166 U. S. 226, 17 S. Ct. 581 (1817);
Luther v. Borden, 7 How. 1 (1849);
Lucas v. Colorado General Assembly, 377 U. S. 713, 84 S. Ct. 1459 (1964);
Nixon v. Herndon, 273 U. S. 536, 47 S. Ct. 446 (1927);
Reynolds v. Sims, 377 U. S. 533, 84 S. Ct. 1362 (1964);
Wesberry v. Sanders, 376 U. S. 1, 84 S. Ct. 526 (1964).

2. Representative of other issues:

Armstrong v. Menzo, 380 U. S. 545, 85 S. Ct. 1187 (1965);

Milliken v. Meyer, 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed. 278;

Priest v. Board of Trustees of Town of Las Vegas, 232 U. S. 604, 34 S. Ct. 443, 58 L. Ed. 751;

Roller v. Holly, 176 U. S. 398, 20 S. Ct. 410, 44 L. Ed. 520;

Grannis v. Ordean, 234 U. S. 385, 34 S. Ct. 779;

Schroeder v. City of New York, 371 U. S. 208, 83 S. Ct. 279 (1962);

Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 694 (1966).

(f) Texts of Applicable Sections of Pennsylvania Constitution and Statutes:

Several provisions of the Constitution of the Commonwealth of Pennsylvania and Legislative Enactments are pertinent to the within matter.

1. Article XI, § 1, of the Pennsylvania Constitution, which is the only constitutionally sanctioned method for amending that Constitution, is as follows:

"§ 1. *Proposal of Amendments by the General Assembly and their adoption*

Amendments to this Constitution may be proposed in the Senate or House of Representatives; and if the

same shall be agreed to by a majority of the members elected to each House, such proposed amendment or amendments shall be entered on their journals with the yeas and nays taken thereon, and the Secretary of the Commonwealth shall cause the same to be published three months before the next general election, in at least two newspapers in every county in which such newspapers shall be published; and if, in the General Assembly next afterwards chosen, such proposed amendment or amendments shall be agreed to by a majority of the members elected to each House, the Secretary of the Commonwealth shall cause the same again to be published in the manner aforesaid; and such proposed amendment or amendments shall be submitted to the qualified electors of the State in such manner, and at such time at least three months after being so agreed to by the two Houses, as the General Assembly shall prescribe; and, if such amendment or amendments shall be approved by a majority of those voting thereon, such amendment or amendments shall become a part of the Constitution; but no amendment or amendments shall be submitted oftener than once in five years. When two or more amendments shall be submitted they shall be voted upon separately."

2. The portions of Act No. 2 relating to this action which provides for the calling of a limited convention, the appointment of 13 ex officio delegates, and method of publication are as follows:

Section 2. Convention; Membership; Qualifications; Vacancies.

(a) . . . In addition, the Lieutenant Governor, the President Pro Tempore of the Senate, the Majority

Leader of the Senate, the Minority Leader of the Senate, the Minority Whip of the Senate, the Minority Caucus Chairman of the Senate, the Speaker of the House, the Majority Leader of the House, the Majority Whip of the House, the Minority Leader of the House, the Minority Whip of the House and the Minority Caucus Chairman of the House shall be members ex officio of the convention and shall have the powers of elected delegates.

Section 7. Substantive Powers of the Convention; Limitations; Mandatory Duties of the Convention.

(a) Except as hereinafter provided in subsection (b), the constitutional convention shall have the power by a vote of a majority of the one hundred sixty three to make recommendation to the electorate on the following subjects only (i) Legislative Apportionment (now covered by sections 16, 17 and 18 of Article II of the Constitution, (ii) Judicial Administration, Organization, Selection and Tenure (now covered in part by Article V of the Constitution), ...

Section 8. Manner of Submitting Proposals to the Electorate.

(b) The changes proposed, together with the questions framed by the convention, shall be certified by the president and secretary of the convention to the Secretary of the Commonwealth not later than the seventh day of March, 1968. The secretary of the Commonwealth shall advertise the proposals of the convention in at least two newspapers of general circulation, if there are such, in every county of the Commonwealth once during the first week in April, 1968. He shall also

publish the Constitution showing the changes proposed by the convention in convenient form and send a copy thereof to each elector requesting it, and ten copies thereof through the County Board of Elections to each polling place for the use of the voters during the election.

3. Those sections of the amended Constitution of Pennsylvania applicable here are as follows:

Section 1. Unified Judicial System.

The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal and traffic courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace. All courts and justices of the peace and their jurisdiction shall be in this unified judicial system.

Section 2. Supreme Court.

The Supreme Court (a) shall be the highest court of the Commonwealth and in this court shall be reposed the supreme judicial power of the Commonwealth.

(b) shall consist of seven justices, one of whom shall be the Chief Justice; and

(c) shall have such jurisdiction as shall be provided by law.

Section 10. Judicial Administration.

(c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace, and

all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for the admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this, with the constitution and neither abridge, enlarge or modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace. . . .

Schedule Section 1. The Supreme Court.

The Supreme Court shall exercise all the powers and, until otherwise provided by law, jurisdiction now vested in the present Supreme Court and, until otherwise provided by law, the accused in all cases of felonious homicide shall have the right of appeal to the Supreme Court.

III. QUESTIONS PRESENTED BY APPEAL.

Inasmuch as there is no factual dispute, facts set forth herein are for the purpose of clarity in framing the issues.

1. The enabling Act calling for a referendum for a constitutional convention provided for the appointment of 13 ex-officio delegates. As mentioned before, these delegates were members of the legislature and, even though not elected to the convention, they were vested with full delegate power and authority. The effect of such a procedure is to disfranchise approximately one million voters of the state. Thus, the basic question presented is whether such action does violence to the equal protection clause of the

fourteenth amendment to the United States Constitution. Constitutional conventions with power to make and revise the organic structure of government and the basic rights of the people demand no less sanction of the fourteenth amendment than a mere legislature. Does, therefore, a disproportioned voting weight, whether in the legislature or a constitutional convention, deny rights of due process and equal protection, guaranteed by the fourteenth amendment?

2. This appeal raises also the age-old conflict between legislatures and courts for supremacy in reviewing legislation. Who has the final say on the constitutionality of legislation? The authority of Pennsylvania's constitutional convention was limited. With respect to the judiciary, the convention had no power to consider jurisdiction of the courts or jury trials in civil cases. Not satisfied with its mandate, the convention not only acted in these matters but rendered the legislature supreme. Are not the people of Pennsylvania entitled to a supreme judiciary? Certainly they must not be deprived of it by a constitutional convention which has acted beyond its authority where the people have no reasonable opportunity to discover this unauthorized conduct before being required to vote.

3. May a majority, even where led by an executive and legislature in power, change the organic law by other than means which they have made a part of their constitutional protections?

Since 1874, Pennsylvanians have been protected against whimsical popular change in their organic law by constitutionally requiring submission of amendments to two separate General Assemblies and approved by the electorate with three months' notice. In proposing Act No. 2, the Pennsylvania legislature has ignored these safeguards. The convention product went directly to the people only 18 days

after publication. Are not the people of Pennsylvania guaranteed by the fourteenth amendment of the United States Constitution that their state constitution will not be altered by other than constitutionally mandated means? Are they not guaranteed at the very least the reasonable opportunity for debate and discussion necessary to an informed electorate?

IV. SUBSTANTIALITY OF GROUNDS.

A. Ex Officio Delegates.

Of prime importance in this appeal is the failure of the Commonwealth of Pennsylvania to insure to every person the equal protection of the law. In selecting delegates to their constitutional convention, Pennsylvania residents were denied the equality of voting weight demanded by the fourteenth amendment of the United States Constitution.

A senatorial district in Pennsylvania is comprised of approximately 226,000 persons. Act No. 2 provided for 150 elected delegates, three from each of the senatorial districts. It also provided for 13 "ex officio" delegates with accreditation equal to any of the elected delegates. By a simple arithmetic calculation, it is evident that each of the elected delegates represented approximately 75,000 people. for the 13 "ex officio" delegates, there were therefore 975,000 persons or 1/11 of the entire population of the Commonwealth of Pennsylvania to whom a disproportionate voice was given.

The arithmetic of franchise debasement is apparent: Either the 13 non-elected delegates over represented 975,000 people or, conversely, the entire population was under represented by the voting weight of these 13 members, disfranchising almost a million persons. Moreover, the people were not simply disfranchised by the disproportioned electorate, but by the design of those detractors from democ-

racy who would not trust the people in convention without imposing on them the protection of "ex offianados".

Whether inequality in representation is the result of absolute disfranchisement, *Nixon v. Herndon*, 273 U. S. 536 (1927), districting and apportionment *Baker v. Carr*, 369 U. S. 186 (1962) and *Reynolds v. Sims*, 377 U. S. 533 (1964), or the County Unit Systems of selecting candidates in primaries, *Gray v. Sanders*, 372 U. S. 368 (1963), the clear principle against which the inequality is measured is ". . . solemnly embodied in the Great Compromise . . . equal representation . . . for equal numbers of people . . .". *Wesberry v. Sanders*, 376 U. S. 1, 14 (1964). Moreover, the ". . . court's plain objective [is] that of making equal representation for equal numbers the fundamental goal . . ." Ibid., 376 U. S., at 17.

A convention organized to consider basic law under which sovereign people shall be governed must be bound to the will of the electorate. Without equal representation for equal numbers, representative government fails at the outset. *Gray v. Sanders, supra*, p. 378, recognized the multilateral application of equal protection in referring to ". . . phases of the problem of representation in state and federal legislatures or *conventions* . . ." (Emphasis added.)

It is startling that had Pennsylvania amended its Constitution in the usual way, the proposals would have been submitted to an equally proportioned General Assembly on two separate occasions. To accept the product of this intentionally disproportioned convention would allow a state to do indirectly—through convention—what it could not do directly through a disproportioned legislature.

It is no answer that a majority of Pennsylvania electors approved this inequality in representation. In *Lucas v. Colorado General Assembly*, 377 U. S. 713 (1964), this Court

demanded a judicial remedy notwithstanding the Colorado electorate's approval of its disproportioned legislature.

> "An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate . . . As stated by this court in *West Virginia State Bd. of Educ. v. Barnette,* 319 U. S. 624, 638, 'One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.' A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."

The Court held that ". . . the fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the equal protection clause . . ." *Lucas, supra,* p. 737.

A constitution must by its nature be an expression of the will of the people. Constitutional conventions are a substitute for a gathering of the people and find authority only insofar as delegates represent the people. Where 1/11 or 8.6% of the convention delegates lack any credentials from the people, the convention's product cannot express the people's will. The Equal Protection clause of the fourteenth amendment demands the conclusion that there was no constitutional convention because it could not speak for the people.

B. Judicial vs. Legislative Supremacy.

By Act No. 2 the constitutional convention was limited, with respect to the judiciary, to consideration of the administration and organization of the courts and selection and

tenure of judges. Notwithstanding this limited authority, the convention chose on its own initiative to go beyond these restrictions by repealing the entire former judiciary article. It substituted a new judiciary with jurisdiction so controlled by the legislature that Pennsylvanians may no longer boast of the tripartite government to which they are entitled.

The history of conflict between the judiciary and legislature is long, troubled and well known. Arguments for or against judicial supremacy have long ago been answered in the language of Chief Justice Marshall and need not be belabored here.

Until Pennsylvania's recent constitutional convention, Pennsylvanians, like all Americans, enjoyed a tripartite form of government with a supreme judiciary. As a result of the convention's Proposals, this is no longer true. They have been deprived of it by a constitutional convention which allowed them only 18 days within which to discover the convention's excesses before being required to vote.

Section 2(c), 10(c) and Section 1 of the Schedule (quoted herein) of the Amended Constitution are those which accomplish the purpose of restricting the judiciary's review of legislation. This is particularly evident from Section 10(c) which allows the Pennsylvania Supreme Court the power to make rules governing practice and procedure, but then destroys the independence of the court by declaring that it shall not ". . . affect the right of the *General Assembly to determine the jurisdiction* of *any* court or justice of the peace . . . ." (Emphasis added) Sections 2(c) and Section 1 of the Schedule clearly provide that the jurisdiction of all of the courts of Pennsylvania is subject to the will of the legislature. The Pennsylvania Supreme Court no longer enjoys status as an equal partner in a tripartite government.

Indeed, this has been accomplished by the constitutional convention, usurping powers and exceeding its authority to consider administration, organization, selection and tenure. Moreover, this was presented to the people of Pennsylvania with only 18 days within which to form a collective judgment of the subtle meanings, purpose and effect.

Appellant submits that the usurpation of authority, the limited time within which to learn of it and the ultimate imbalance created between the judiciary and the legislature are, collectively and individually, a deprivation of the rights of the residents of Pennsylvania, guaranteed by the fourteenth amendment of the United States Constitution.

C. Abrogation of Pennsylvania Constitutional Protections.

Not so apparent in precedent but immensely significant in its broad application to modern social and political life is the third issue involved in this appeal. A need for constitutional reform in Pennsylvania was and is apparent. Under the terms of Pennsylvania's Constitution, however, amending it requires action by two separate legislatures, publication ninety days prior to the election of the second legislature and ninety days before the proposals are submitted to popular ballot. Well-intentioned perhaps, but unwilling to assume its constitutional burdens, the Pennsylvania Legislature passed Act No. 2, hoping to authorize but yet control a constitutional convention with a limited franchise.

In circumventing the built-in constitutional protections which afforded voters the opportunities of debate between proponents and opponents, and informed, intellectual analysis, the Pennsylvania legislature has engaged in constitution making. By eliminating an informed consent to

the constitutional amendments, the legislature has worked its will, not the people's.

We need not belabor here the struggle of combatants on behalf of law and order whose protest against guaranteed individual liberty has recently followed the fashion of constitutional revision. This kind of "reform" movement is or has been active in virtually every state and the Federal government. When, as under the United States Constitution, Americans are guaranteed that there is only one way in which their basic law can be changed, this writer believes that they have a right to demand that it will not be changed in any other way. It is unthinkable that a majority of the United States Congress could propose an act by which a majority of American voters could approve some other method of amending the United States Constitution. If this were possible, such a majority need not change the Bill of Rights to accomplish its purpose. It need only dilute the power or jurisdiction of the courts to strip minorities of their protection.

Appellant believes that the wrong perpetrated need not be in a harmful result. The evil of which we complain is in the means. If legislatures are allowed to depart from the mandated methods of amending constitutions, a court which waits for the unconstitutional result may well be a differently constituted court than the one which should have acted to strike down the unconstitutional conduct in the first instance.

This writer does not believe that the greatest threat to our future is from hydrogen bombs and guided missiles. Our civilization will not die that way. It will die only when no one cares. As Arnold Toynbee has pointed out, 19 of 21 civilizations have died not by conquest but from within. There were no bands playing nor flags flying when these civilizations decayed. It happened slowly, in the quiet and dark, when no one was awake.

We do not have here simply a departure from mandated constitutional requirements. The departure involved a virtual elimination of public investigation of the proprosals on which the electorate was required to vote.

Our law is replete with instances requiring reasonable notice of a threat to property rights. An elementary and fundamental requirement of due process in any proceeding is notice to interested parties which is reasonably calculated under all the circumstances to afford them an opportunity to present objections. *Armstrong v. Menzo*, 380 U. S. 545, 85 S. Ct. 1187 (1965); *Milliken v. Meyer*, 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed. 278; *Priest v. Board of Trustees of Town of Las Vegas*, 232 U. S. 604, 34 S. Ct. 443, 58 L. Ed. 751; *Roller v. Holly*, 176 U. S. 398, 20 S. Ct. 410, 44 L. Ed. 52.

As was observed in *Grannis v. Ordean*, 234 U. S. 385, 394, 34 S. Ct. 779, 783, a fundamental requirement of due process is "the opportunity to be heard." This opportunity must be granted at a meaningful time and in a meaningful way. "This right . . . has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Schroeder v. City of New York*, 371 U. S. 208, 83 S. Ct. 279 (1962).

In matters involving the deprivation of personal liberties, this Court has demanded for criminal defendants an *informed* consent to any waiver of their fifth amendment guarantees. There must be a "voluntarily, knowing and intelligent relinquishment of the privilege. *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 694, 724 (1966).

In matters involving civil litigation, a patient cannot consent to surgery or a course of medical care without first being fully informed of the possible consequences.

Nowhere in our law is there a greater need for a reasonable opportunity "to know" than in the circumstances presented by this appeal. Pennsylvania voters were entitled to their mandated constitutional method of amendment. They were entitled to a reasonable opportunity to become informed. The denial of either or both of these elements is and must be regarded by this Court as a violation of their federally guaranteed rights of due process and equal protection.

CONCLUSION.

The handwriting on the wall; the echoes in the hills, are unalterably clear. America's next Constitutional Crisis —perhaps it is already here—is a national attack on judicial power.

Courts which demand and safeguard the constitutional guarantees of individuals and minorities are assaulted openly by restless and contemptuous majorities. In this political and social climate it is not surprising that legislators, anxious to speak for majorities, contrive means such as Pennsylvania's Constitutional Convention to circumvent the protections of an informed electorate.

Nor is it surprising that once converned, a convention speaking through the voices of 13 ex-officio delegates of legislators, assumes power beyond its mandate in order to effect control by the legislature over the judiciary.

Separation of power is one of the roots with which the tree of liberty fastens in the soil of real life, and through which it receives the sap of fresh existence. Not only is this principle eminently philosophical, but it must survive the ravages of time and expediency.

Not only the people of Pennsylvania, but the people in every state, will have cause to rejoice at their deliverance from the deprivation of rights employed by the Pennsylvania legislature.

It is respectfully prayed that this Court will tell the legislators of all States they will not contrive ex-officio, non-representative delegates to constitutional conventions. They will not deprive their people of constitutionally-sanctioned methods of changing their constitutions which provide a reasonable opportunity for the electorate to become informed. Nor will usurpation of authority by constitutional conventions or a change in the balance of legislative and judicial power be tolerated.

Respectfully submitted,

JAMES E. BEASLEY,
Attorney for Appellant.

APPENDIX A-1.

IN THE

SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT.

No. 38, MAY TERM, 1969.

IRVIN STANDER AND ALEXANDER H. LINDSAY,
Appellants

v.

JOSEPH J. KELLEY, JR., SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM DECREE OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY AS OF NO. 197 COMMONWEALTH DOCKET 1968, NO. 2859, EQUITY DOCKET.

OPINION OF THE COURT.

BELL, *C. J.*

On April 23, 1968, the eligible voters of Pennsylvania adopted several amendments to the Constitution of Pennsylvania. Included among these was a complete revision of Article V relating to the Judiciary. The vote approving the new Judiciary Article, which superseded the old Judiciary Article, was 910,855 in favor and 729,845 against.

The plaintiffs, taxpayers and owners of real estate in Pennsylvania, on April 11, 1968 filed a taxpayers' Complaint in Equity against the Secretary of the Commonwealth in the Dauphin County Common Pleas Court, in which the Court was asked to enjoin a vote by the electorate on the new proposed Constitutional Amendments and to hold them invalid and void.

The plaintiffs, on April, 1968, had originally attempted to obtain a preliminary injunction which sought to enjoin the Secretary of the Commonwealth from printing the questions pertaining to the Constitutional amendments on the ballots to be furnished the electors at the April 23, 1968 election. The Dauphin County Common Pleas Court refused to grant the *preliminary* injunction, principally on the basis of the plaintiffs' laches* in waiting until the "eve" of the election to bring their action. An appeal was taken to this Court, which affirmed the dismissal of the preliminary injunction on the ground that the Court below had not committed a clear abuse of discretion or a palpable error of law: *Stander v. Kelley*, 432 Pa. 1, — A. 2d —. An amended complaint was thereafter filed seeking permanent equitable relief. This too was denied by the Dauphin County Court and its Order dismissing the complaint and entering a decree in favor of the defendant serves as the basis for the present appeal.

Because of the tremendous importance of this question to all the people of Pennsylvania, we shall first point out what questions are, and what questions are not involved, and then discuss several of the contentions made by the Commonwealth and all of the principal contentions made by

* The proposed amendments were first advertised in the first week of April (April 5), 1968. The plaintiffs brought a bill to enjoin the election on April 11, 1968, which under all the facts did not constitute laches.

the appellants.* The broad question involved is whether the new Judiciary Article V, which in practical effect repealed Article V of the Constitution of 1874, is Constitutional or is null and void. It is unnecessary at this time and in this case to unravel the conflicts or to interpret the many ambiguities which exist in the new Judiciary Article, or the wisdom or foolishness of any of its provisions. Speaking more specifically, the questions involved are: Was the new Judiciary Article adopted by the people without violating the existing Pennsylvania Constitution of 1874, or the Constitution of the United States, or any pertinent Act of the Legislature?

JUSTICIABILITY.

The Commonwealth contends that none of the questions raised by appellants nor the Constitutionality of the new Judiciary Article itself is justiciable, because the ultimate sovereign power of our Government reposes in the people and the people have approved by their vote the new Judiciary Article. The Attorney General supports this position by a reference to *Woods's Appeal,* 75 Pa. 59; *Wells v. Bain,* 75 Pa. 39; *Armstrong v. King,* 281 Pa. 207, 126 Atl. 263; *Taylor v. King,* 284 Pa. 235, 130 Atl. 407.

In *Taylor v. King,* 284 Pa., supra, the Court considered a mandamus action to compel the Secretary of the Commonwealth to advertise a proposed Constitutional Amendment. The Court said, inter alia (page 239):

"The Constitution of the State may be legally amended in the manner specifically set forth therein, *or a new one may be put in force by a convention duly assembled, its action being subject to ratification by the people,*** but these

* Briefs of the parties and of the amici curiae totaled, exclusive of the voluminous exhibits, 220 pages.

** Italics, ours.

are the only ways in which the fundamental law can be altered. . . .

"There may be technical error in the manner in which a proposed amendment is adopted, or in its advertisement, yet, if followed, unobjected to, by approval of the electors, it becomes a part of the Constitution. . . ."

In *Armstrong v. King,* 281 Pa., supra, the Court held that the bonus amendment which had previously been submitted to and rejected by the people under the authority of Article XVIII of the 1874 Constitution could not again be submitted within the five-year period, and enjoined the officers of the Commonwealth from advertising the proposed amendment. The case is well stated in the Syllabus (page 207): "5. Where such proposed amendment has been adopted by two successive legislatures, has been approved by a majority of the electors, has been acted upon by those charged with administration under it, and public or private rights would be injuriously affected by setting it aside, it is too late to do so, even by a direct attack on the ground that it was submitted for approval at the wrong time, and it cannot then be collaterally attacked for any reason." The Court said (page 214): "Under what circumstances, if any, a direct attack can be made on a constitutional amendment, after adoption by the people, because of a failure to comply strictly with some procedural condition leading up to the submission, has been the subject of many and lengthy opinions, with results impossible of reconciliation." Although unnecessary to the result reached, the Court again approved the calling of a Convention to amend the Constitution of this Commonwealth if approved by vote of the people, and stated that mere errors of procedure would not invalidate the vote of the people.

The Attorney General contends that the aforesaid cases hold that the Constitutionality of a Constitutional

amendment can be challenged in the Courts *before* its approval by the electorate, *but never after.* Although some language in these cases may support the Commonwealth, this Court, nevertheless did take jurisdiction and considered the questions raised.

Woods Appeal, 75 Pa. 59, contains some language, as do the cases above, which supports the Attorney General's contention that a Constitutional amendment can be challenged in the Courts *before* its approval by the electorate *but never after.* Assuming these cases are apposite, if they hold as the Commonwealth contends, the foolishness of such a holding in the present era is obvious. If there is a palpable violation or violations of the existing Constitution, the Commonwealth contends that that question or issue is *justiciable* if decided by the Courts one week or *one day prior* to the election, *but is not justiciable one day after* the people have voted to approve or adopt the Amendment, no matter how clearly the provisions of the existing Constitution may have been violated. Furthermore, under the theory of the Commonwealth, a trial Court or an appellate Court could unintentionally or intentionally enable a palpable violation or violations of the Constitution of Pennsylvania, or of the Constitution of the United States, to become Constitutional and non-justiciable,* if, through an overload of work, or inadvertence, or laziness, or incompetence, or illness, or for any reason whatsoever it failed to render a decision before the question was approved by the vote of the people. However, the recent decisions of the Supreme Court of the United States are analogous and controlling. They expressly and specifically hold that (1) *a vote of the people* cannot validate and Constitutionalize anything which violates a provision of the Constitution, and (2) *this question*

* Other jurisdictions (*State v. Holman,* 296 S. W. 2nd 482; *Stovell v. Gartrell,* 332 S. W. 2nd 256) have held to the contrary.

or issue of Constitutionality is justiciable after the voters have adopted such a provision: Baker v. Carr, 369 U. S. 186; *Reynolds v. Sims,* 377 U. S. 364; *Wesberry v. Sanders,* 376 U. S. 1; *Lucas v. 44th General Assembly of Colorado,* 377 U. S. 713; *Jordan v. Silver,* 381 U. S. 415; Cf. *Hunter v. Erickson,* 37 U. S. L. W. 4091 (Jan. 20, 1969); cf. also *Butcher v. Bloom,* 420 Pa. 305, 216 A. 2d 457.

These cases demonstrate that Constitutionally ordained rights must and will be protected by the Courts against the will as well as against the vote of a majority of the people In *Lucas v. 44th General Assembly of Colorado,* 377 U. S., supra, the Court pertinently said (pp. 736-737): "Courts sit to adjudicate controversies involving alleged denials of constitutional rights. . . . An individual's constitutionally protected right to cast an equally weighted vote cannot be denied *even by a vote of a majority of a State's electorate,** if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause. Manifestly, the fact that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act. As stated by this Court in West Virginia State Bd. of Educ. v. Barnette, 319 U. S. 624, 638, *'One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.'* * *A citizen's constitutional rights can hardly be infringed simply because a majority of the people chose that it be.** We hold that the fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause, as delineated in our opinion in Reynolds v. Sims."

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* Italics, ours.

In *Jordan v. Silver*, 381 U. S. 415, the California Constitution reserved to the people of California the power to propose Constitutional amendments by filing a petition with the Secretary of State, signed by eight per cent of the persons who voted in the preceding gubernatorial election. The voters of California approved a plan to provide a Federal-type plan for the election of senators and representatives in California. The plan provided, inter alia, for a Senate composed of 40 members with detailed provisions for their senatorial districts. This plan was approved by a vote of the people, and three times thereafter the people voted against changing this apportionment system for the senatorial election. Notwithstanding the vote of the people, the Supreme Court held this senatorial apportionment and election by the people to be invalid under the Court's decisions in *Reynolds v. Sims*, 377 U. S. 533, and companion cases.

To summarize: It is a traditional and inherent power of the Courts to decide all questions of Constitutionality, and the recent decisions of the Supreme Court of the United States hold that alleged violations of the Constitution are justiciable even after they have been voted upon and approved by the people.

THE USE OF THE CONSTITUTIONAL CONVENTION.

On March 15, 1967, the Governor of Pennsylvania approved Act No. 2 of 1967 which provided for a limited Constitutional Convention. Appellants contend that this Constitutional Convention method was unconstitutional because Article XVIII of the 1874 Pennsylvania Constitution* sets forth in great detail the manner in which the Constitution of Pennsylvania may be amended and contains no pro-

* Article XVIII has since been renumbered by proclamation of the Governor as Article XI.

vision for the calling of a Constitutional Convention. Nevertheless, this Court has several times previously held that amendments to our prior and existing Constitution may be initiated by the calling of a Constitutional Convention, provided a majority of the electors vote in favor of such a call. Unmindful of the fact that the Constitution of 1874, which has been the framework of our State Government for over 90 years, was adopted by the convention method at a time when the amendatory provisions of the then existing Constitution did not prescribe a convention as a method for Constitutional change, appellants contend that nowhere in any Article or provision of the Constitution is there any authority for the calling of a Constitutional Convention for the purpose of permitting the people to amend the Constitution. Appellants also forget that the provisions for the adoption of the Constitution of the United States directly contravened Article XIII of the Articles of Confederation which were drawn up and submitted to the people through a Constitutional Convention, and that 12 of the original 13 State Constitutions contained no amendment provisions, yet all of them were amended from time to time by the Convention method. Appellants further contend that a failure to follow the clear and specific amendment provisions renders the new Judiciary Article invalid and void.

We reaffirm our prior decisions which have consistently held that so long as a Constitutional Convention is not expressly prohibited by the then existing Constitution, it represents a proper manner and method in which the citizens of Pennsylvania *may initiate* an amendment of their Constitution. *Taylor v. King,* 284 Pa., supra; *Armstrong v. King,* 281 Pa., supra; *Wells v. Bain,* 75 Pa., supra; *Woods's Appeal,* 75 Pa., supra; Article 1, Section 2, of the 1874 Constitution of Pennsylvania.

CONFORMITY WITH THE CONSTITUTIONAL AMENDMENT PROCEDURES.

1. *Notice and Advertisement.*

Article XI of the Pennsylvania Constitution of 1874, set forth above, provides that proposed amendments to the Constitution shall be published "three months" before being submitted to the people. In this case, notice of the amendment proposals were published on April 5, 1968, only eighteen days before the election. Appellants contend that the failure to give notice in accordance with Article XI renders the approved amendments illegal and void.

It is undoubtedly true that in matters relating to the alteration or amendment or change or abolition of the Constitution, which is the fundamental Law of our Commonwealth, all the clear and mandated provisions of the Constitution must be strictly followed and obeyed and no departures from or circumventions or violations of existing mandatory Constitutional amendment requirements will be permitted. *Commonwealth ex rel. Attorney General v. Beamish,* 309 Pa. 510, 164 Atl. 615. However, the appellants misconstrue what has taken place here. These new amendments to or revision of the Constitution were not adopted pursuant to the provisions of Article XI of the Constitution of 1874, but were adopted pursuant to and through a different manner of amendment—the Constitutional Convention. As we said earlier, this Court has declared that the convention method of amending the Constitution is lawful. Since, as we have above held, the electorate may employ the convention process for amending the Constitution, it follows that the people have the right to determine initially or by ratification the manner and matter of notice and times of publication which they desire or are willing to sanction. Act No. 2 of 1967 specifically provides: "The Secretary of the Commonwealth shall advertise the pro-

posals of the convention in at least two newspapers of general circulation, if there are such, in every county of this Commonwealth once during the first week in April, 1968." The Secretary has complied with this direction or mandate and, accordingly, we hold that notice and advertisement was timely and adequate.

We further note that in both 1836 and in 1873 the existing provision of the Constitution with regard to advertising was not followed in the Act setting up the convention, and in the instant matter *the complete text* of the proposed Constitution was published on April 5, 1968, in 134 newspapers which were published and circulated throughout the entire Commonwealth.

2. *The Ballots.*

Appellants also challenge the form of the notice of the proposed Constitutional amendments as it appeared on the ballots submitted to the electorate at the April 1968 primary election. The ballot question relating to the Judiciary Article amendment read as follows: "JUDICIARY—Ballot Question V: Shall Proposal 7 on the JUDICIARY, adopted by the Constitutional Convention, establishing a unified judicial system, providing directly or through Supreme Court rules, for the qualifications, selection, tenure, removal, discipline and retirement of, and prohibiting certain activities by justices, judges, and justices of the peace, and related matters, be approved?"

It is obvious that this question as printed on the ballots is but a tiny and minuscular statement of the very lengthy provisions of the proposed Judiciary Article V. It is equally clear and realistic beyond the peradventure of a doubt that a lengthy summary of the proposed Judiciary Article could not have been printed on an election ballot. The first and most important question on this point is:

Does the question as stated on the ballot fairly, accurately and clearly apprize the voter of the question or issue to be voted on? Our answer to this question is "Yes." In recognition of this right of the electorate to be clearly and more fully informed of the question to be voted on, the Legislature by Act No. 2 of 1967 required the Secretary of the Commonwealth to "also publish the Constitution showing the changes proposed by the convention in convenient form and send a copy thereof to each elector requesting it, and ten copies thereof through the County Board of Elections to each polling place for the use of the voters during the election." The Secretary of the Commonwealth complied with this mandate.

Appellants contend that the electorate had no more idea or knowledge of the "notice" requirements, or of the real question stated on the ballot than it knew what it was approving when it adopted the new Constitutional amendment in April of 1968. In a Republican or Democratic form of Government, a similar contention is made after almost every election—the people didn't know or did not understand what (or whom) they were really voting for. This generalization has never been proved and will not be assumed by us.

AMENDMENT MORE THAN ONCE IN FIVE YEARS.

Article XVIII of the Constitution of 1874 and Article XI of the new Constitution provide: ". . . no amendment or amendments shall be submitted oftener than once in five years . . ." In 1965, an amendment to the Judiciary Article which pertained to the assignment by the Chief Justice of former Judges was submitted to and approved by the electorate. Appellants contend that an adoption of the new Judiciary Article violates Article XVIII of the Constitution of 1874 and also of the specific provisions of the new Judiciary Article.

The amendments here in issue were, we repeat, not adopted pursuant to Article XVIII but were adopted in and by a different *lawful* manner. Furthermore, in *Commonwealth ex rel. Margiotti v. Lawrence*, 326 Pa. 526, 193 Atl. 46, this Court said (pages 534-535): "'. . . The clause "but no amendment . . . shall be submitted oftener than once in five years" . . . clearly *refers to such as has already been submitted** and rejected in light of the language used . . . it refers to an amendment that has been submitted before and rejected and not to one that was never before submitted.'" Accord, *Commonwealth v. King*, 278 Pa. 280, 122 Atl. 279.

The prior proposed amendments which were adopted by the people were different from the 1968 amendments to the new Judiciary Article and do not preclude or prohibit the 1968 amendments.

NON-ELECTED DELEGATES.

Act No. 2 of 1967 provided for the election of 150 delegates and the selection of 13 delegates. These 13 delegates were political leaders of the Legislature* and "shall be members ex officio of the convention and shall have the powers of elected delegates."

Appellants contend that since thirteen of the 163 members of the Constitutional Convention were not elected to the convention, almost a million citizens of Pennsylvania were disenfranchised in their representation at the conven-

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* Italics, ours.

* The Lieutenant Governor, the President Pro Tempore of the Senate, the Majority Leader of the Senate, the Majority Whip of the Senate, the Minority Leader of the Senate, the Minority Whip of the Senate, the Minority Caucus Chairman of the Senate, the Speaker of the House, the Majority Whip of the House, the Majority Leader of the House, the Minority Leader of the House, the Minority Whip of the House, and the Minority Caucus Chairman of the House.

tion. They point out that since 82 votes (a majority) could approve a proposal at the convention, and if the thirteen non-elected delegates should be included in these 82, then only 69 of the 150 delegates elected by the people would be needed to adopt a proposal.

Appellants further specifically claim that the existence of non-elected delegates deprives the voters of Pennsylvania of equal representation to which they are entitled under the equal-protection clause of the Fourteenth Amendment to the Constitution of the United States. In support of this contention, appellants cite the recent reapportionment cases of the United States Supreme Court, including *Baker v. Carr,* 369 U. S. 186; *Reynolds v. Sims,* 377 U. S. 533; and *Gray v. Sanders,* 372 U. S. 368, and *Lucas v. Colorado,* 377 U. S., supra. Cf. also the very recent case of *Hunter v. Erickson,* supra (January 20, 1969).

The function of the Constitutional Convention was to propose and *recommend* to the electorate of Pennsylvania changes and alterations in the existing State Constitution. The Convention had no law-making powers of any kind. Act No. 2, Sections 7, 8 and 9. The approval or disapproval of the Constitutional Convention's proposed amendments in April of 1968 was submitted to the electorate of Pennsylvania solely on a statewide basis, which is the purest form of "one man, one vote." If the convention which submitted the proposals did not represent all of the voters of the State equally, this defect was clearly cured by the approval of the voters at the April 28, 1968 statewide election.

We find no merit in this contention of appellants.

Since the delegates to the Constitutional Convention had no power to bind the people, and since a majority of the electorate of Pennsylvania voted to adopt the new Judiciary Article, the appellants cannot claim injury or Constitutional infirmity from the manner in which the delegates were chosen.

Discrepancies Between Convention Journals and the Final Proposed Amendments.

This contention of the appellants has so little merit that we shall dismiss it by merely referring to the following cases which specifically or by analogy decide the question adversely to the appellants. *Mikell v. Philadelphia School District,* 359 Pa. 113, 124, 58 A. 2d 339; *McGuigen Estate,* 388 Pa. 475, 482, 131 A. 2d 124; *Martin Estate,* 365 Pa. 280, 74 A. 2d 120, and cases cited.

Habeas Corpus and Waiver of Jury Trial.

Appellants' contention that (1) the right of the people to a writ of habeas corpus and (2) their right to a jury trial has been abrogated or nullified, is utterly and completely devoid of merit. See Article I, Sections 6 and 9 and 14, and Article V, Section 25, of the new Constitution of Pennsylvania; and Article I, Section 9(2) and Article III, Section 2(3) of the Constitution of the United States.

Separation of Powers.

Appellants vigorously urge this Court to declare the new Judiciary Article of the Pennsylvania Constitution null and void on the ground that it violates the traditional and fundamental concepts inherent in the separation of jurisdiction and powers among the three branches of our Republican Form of Government (Art. IV, Sec. 4, of the Constitution of the United States). Throughout the history of our Country, the dividing line between and the boundaries and powers of the three separate co-equal branches of our Government,—namely, the Executive and the Legislative and the Judicial—are sometimes indistinct and are probably incapable of any precise or exact definition. This indefiniteness and unboundarized jurisdiction

and power has often caused heated controversy in our National Capital. Generally speaking, the Executive branch has the power to recommend legislation and the power and the duty to see that the laws are faithfully administered and carried out. The Legislative branch has the power and the duty to pass legislation; and the Courts have the power, the duty and the responsibility of interpreting the Constitution and all legislation and determining whether legislation and presidential orders and all other questions and issues meet or violate the requirements of the Constitution.

In the light of these premises, we shall now discuss more specifically the provisions of the new Judiciary Article which are alleged to violate, obliterate and destroy the jurisdiction and the powers of the third branch of our Government, namely, the judiciary, and in this case particularly, the Supreme Court of Pennsylvania.

The new Article V provides:

"Unified Judicial System

Section 1. The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, . . .

"Supreme Court

Section 2. The Supreme Court (a) shall be the highest court of the Commonwealth and in this court shall be reposed the supreme judicial power of the Commonwealth;

. . .

"Judicial Administration

Section 10. (a) The Supreme Court shall exercise general supervisory and administrative authority over

all the courts and justices of the peace, including authority to temporarily assign judges and justices of the peace from one court or district to another as it deems appropriate.

(b) The Supreme Court shall appoint a court administrator and may appoint such subordinate administrators and staff as may be necessary and proper for the prompt and proper disposition of the business of all courts and justices of the peace.

(c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions."

The Judiciary Article provides for additional powers to be vested in and exercised by the Supreme Court. However, in numerous other provisions of the new Judiciary Article for the whole State, and likewise special provisions for the City of Philadelphia, Allegheny County and the

City of Pittsburgh, the Article contains language "until otherwise provided by law," or similar language.*

The Constitution of 1874 contained similar provisions which used the phrase "as shall or may be provided by law", or almost identical language.** In the 94 years of its existence, this or similar phraseology was interpreted by the Supreme Court and caused no serious dissension or irreparable conflicts.

Appellants have raised a number of additional objections which relate in lesser or greater degree to the broad question of separation of powers. These include the contention (a) that the new Article V went beyond the call of the Convention, and (b) that the Legislature may not be given the power to establish new Courts, even though under Article V, Section 1, of the Constitution of 1874 the Legislature has over the years established the Superior Court as well as additional County and Municipal Courts, and (c) that there has been a deprivation of the original jurisdiction of the Supreme Court as ordained in the 1874 Constitution and an infringement of the King's Bench powers of the Supreme Court. We find each of these contentions to be devoid of merit on the issue here involved.

When the meaning or interpretation and the Constitutionality of a particular provision, section or sentence of the new Constitution is properly raised, the question and issue so raised can be determined in that suit, but such determination would not affect the Constitutionality of the entire Judiciary Article.

Decree affirmed, each party to pay own costs.

Mr. Justice ROBERTS files a concurring Opinion, in which Mr. Justice JONES joins.

Mr. Justice COHEN files a dissenting Opinion.

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* See particularly Sections 1-10; Sections 16, 17, 18, 20, 21, 25.

** See particularly Sections 1, 3, 6, 7, 8, 12, 18 and 20.

APPENDIX A-2.

IN THE

SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

No. 38 MAY TERM, 1969

IRVIN STANDER AND ALEXANDER H. LINDSAY,
Appellants

v.

JOSEPH J. KELLEY, JR., SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM DECREE OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY AS OF NO. 197 COMMONWEALTH DOCKET 1968, NO. 2859, EQUITY DOCKET.

CONCURRING OPINION.

ROBERTS, *J.* FILED: February 7, 1969

I concur in the result reached by the majority in affirming the decree of the court below. However, I deem it appropriate to discuss further appellants' contentions dealing with the abrogation of the right to habeas corpus, the right to civil jury trial and the King's Bench powers of this Court.

Appellants urge in their brief that "in the Judiciary Article . . .; for all its verbiage nowhere does it tell us in which court the great writ of habeas corpus is for all time to be found, and protected from the ill winds of political chicanery." This statement on its face appears correct; however, appellants' inquiry into the future viability of the writ of habeas corpus should not end with Article V. Certainly the Constitution is an integrated document and clauses in one article must be read in light of the provisions of all the others. It is made quite clear in Article I, Section 14 "that the privilege of the writ of habeas corpus shall not be suspended." And lest it be thought that while not suspended, the Legislature might choose to withdraw jurisdiction over such writs from the courts of this Commonwealth, Section 11 of the same Article clearly provides "All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Therefore, it is abundantly clear that the "Great Writ" retains its historical character as the ultimate and essential safeguard of individual rights and that the courts of the Commonwealth of Pennsylvania must and will continue to make its protections available.

Appellants also contend that the Constitutional Convention abrogated the right to trial by jury in civil cases. To support this argument they point to Section 25 of Article V: "Section 25. Dispensing with Trial by Jury.—*Until otherwise provided by law,* the parties, by agreement filed, may in any civil case dispense with trial by jury, and submit the decision of such case to the court having jurisdiction thereof, and such court shall hear and determine the same. . . ." (Emphasis supplied.) While appellants concede that the unitalicized portion merely grants civil litigants the right to waive a jury trial, their argument is that "Until otherwise provided by law . . ." means that the Legis-

lature can provide another procedure other than mutual waiver which will result in the abrogation of the right to trial by jury.

However, I find that argument particularly unpersuasive. The error in appellants' reasoning lies in the narrow interpretation they place on the meaning of the word "law." It is my view that such a narrow interpretation not only was not intended by the framers of this Section, but also would yield an unreasonable result. For if the appellants are correct, what would be the meaning of Article I, Section 6, which guarantees "Trial by jury shall be as heretobefore, and the right thereof remain inviolate"? The better view is that the word "law" includes not only statutory law, but also case law and constitutional law. Thus, so long as Article I, Section 6 is not repealed or amended by a future constitutional convention or constitutional amendment, any statutory law which attempted to change the right to trial by jury in civil cases would be a nullity.

The third contention of appellants to which I want to address myself is that dealing with the elimination of this Court's King Bench powers and the failure to provide for separation of powers between the legislative and judicial branches of our government. Appellants' argument focuses on Section 2(c) of new Article V, which states "Section 2. Supreme Court.—The Supreme Court . . . (c) shall have such jurisdiction as shall be provided by *law*." (Emphasis supplied.) Once again appellants' reasoning is based on an erroneous and excessively narrow construction of the word "law." They would have us interpret "law" to mean only legislatively passed statutory law and then view this Court's jurisdiction as completely at the whim and caprice of the Legislature.

However, such an interpretation of a broad word like "law" is erroneous in this context. The preferred inter-

pretation of that clause *must* include not only statutory law, but also case law, Pennsylvania Constitutional law, and United States Constitutional law. When viewed in this light, it is obvious that the jurisdiction of the Pennsylvania Supreme Court is still very much intact and that action by the Legislature can in no way restrict our essential judicial functions. First, the new Constitution provides in Article V, Section 1 that "The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court . . . ." Further, Section 2 of the same Article announces "The Supreme Court (a) shall be the highest court of the Commonwealth and in this court shall be reposed the supreme judicial power of the Commonwealth." Finally, Section 10 of the Constitution explicitly establishes that "The Supreme Court shall have general supervisory and administrative authority over all the courts and justices of the peace" and that it "shall have the power to prescribe general rules governing practice, procedure and conduct of all courts."

All of these quoted provisions are *constitutional* and the guarantees and safeguards inherent in these provisions could *never* be limited or eliminated simply by legislation. In addition, there are other functions inherent in the Commonwealth's judicial power which are required by federal constitutional law. It could never be validly asserted that these requirements might be amended or restricted by an act of the Pennsylvania Legislature. In short then, and without citing specific examples, it is my view that to read Article V, Section 2(c) to mean that the Legislature has complete plenary control over the jurisdiction of this Court is completely incorrect; therefore appellants' argument that the essential separation of powers has been violated must fail. The Legislature, in attempting to define the jurisdiction of this Court, cannot infringe on the limitations, as

judicially interpreted, that are in the Pennsylvania and United States Constitutions.

Appellants in a like manner argue that the King's Bench powers of this Court as set out in the Act of May 22, 1722, 1 Sm. L. 131, § XIII, have been eliminated. But, even a cursory glance at the judiciary provisions of the Constitution indicates that this argument is without merit. In fact, it appears that some of the original King's Bench powers of our Court have now been recited in the Constitution. First, the Court has constitutionally enunciated power to remove and disclipine judges under Article V, Section 18(h). In addition, the right to transfer judicial manpower in light of the overall needs of the Commonwealth is set out in Section 10(a) of the same Article. Further, the provisions of Section 10 quoted above clearly describe the general supervisory and administrative authority of the Supreme Court over all other courts and justices of the peace. Finally, Article V, Section 2 provides, in the last analysis, conclusive response to the appellants' concern. This clause speaks of the "supreme judicial power" reposing in this Court and can mean no less than that this Court possesses every judicial power that the people of the Commonwealth can bestow under the Constitution of the United States. I think that these considerations taken together obviously illustrate that the King's Bench powers of this Court have in no way been restricted. The judicial power reposed in this Court will continue as before unimpaired by any mistaken notion that the Legislature has the constitutional authority to diminish, curtail or interfere with its functions.

APPENDIX A-3.

IN THE

SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT.

No. 38, MAY TERM, 1969.

IRVIN STANDER AND ALEXANDER H. LINDSAY,
Appellants

v.

JOSEPH J. KELLEY, JR., SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE DECREE OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY AS OF NO. 197 COMMONWEALTH DOCKET 1968, NO. 2859, EQUITY DOCKET.

DISSENTING OPINION.

COHEN, *J.*

In *Wells v. Bain*, 75 Pa. 39, 47 (1874), Chief Justice Agnew wrote that there are "but three known recognized modes by which the whole people, the state, can give their consent to an alteration of an existing lawful frame of government, viz:

"1. The mode provided in the existing constitution.

"2. A law, as the instrumental process of raising the body for revision and conveying to it the powers of the people.

"3. A revolution."

"The first two are peaceful means through which the consent of the people to alterations is obtained, and by which the existing government consents to be displaced without revolution. The government gives its consent, either by pursuing the mode provided in the constitution, or by passing a law to call a convention. If consent be not so given by the existing government the remedy of the people is in the third mode—revolution."

Even if we ignore appellant's contention that Act No. 2 of the 1967 Session did not properly follow Article 18 of the 1874 Constitution, we must, nevertheless, determine whether a proper body for revision of the existing lawful frame of government was constituted by Act No. 2. I am constrained to hold that because section 2 of the Act provides for 13 *ex officio* members in addition to 150 elected delegates, that the *ex officio* members so dilute the elected body established for revision of the frame of government that it is not representative of the whole people and hence, unlawful and void.[1]

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1. Section 2 provides, inter alia:

". . . In addition, the Lieutenant Governor, the President Pro Tempore of the Senate, the Majority Leader of the Senate, the Majority Whip of the Senate, the Minority Leader of the Senate, the Minority Whip of the Senate, the Minority Caucus Chairman of the Senate, the Speaker of the House, the Majority Leader of the House, the Majority Whip of the House, the Minority Leader of the House, the Minority Whip of the House and the Minority Caucus Chairman of the House shall be members ex officio of the convention and shall have the powers of elected delegates."

The essence of a constitutional convention is only maintained if it represents the people. It is a substitute for the gathering of the entire populace. The presence of *ex officio* delegates exercising the full powers of elected delegates is foreign to the concept of a convention as a gathering of the people. Thus, there was no convention and nothing which flowed from it is valid even if the product of the convention is subsequently approved by the majority of the voters.

I recognize that the leadership of the General Assembly that approved the Act held within their political power the "yes" or "no" on whether a constitutional convention should be called. But those in favor of a convention should not have surrendered the very essence of government in order to have the General Assembly pass the call. The cost was too high. It permitted the leadership of the General Assembly to become part of the convention without exposing themselves to the will of the people, and to influence, if not control, the convention's deliberations.[2] I

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2. Section 5 provides, inter alia:

"The Lieutenant Governor, the President Pro Tempore of the Senate the Majority Leader of the Senate, the Majority Whip of the Senate, the Minority Leader of the Senate, the Minority Whip of the Senate, the Minority Caucus Chairman of the Senate, the Speaker of the House, the Majority Leader of the House, the Majority Whip of the House, the Minority Leader of the House, the Minority Whip of the House and the Minority Caucus Chairman of the House shall constitute a Preparatory Committee to make arrangements for the convention. . . . The committee shall initiate any studies, inquiries, surveys or analyses it may deem relevant through its own personnel or in cooperation with any public or private agencies, including institutes, universities, foundations or research organizations. In so doing, the committee may hold public or private hearings. It may issue subpoenas under the hand and seal of its chairman commanding any person to appear before it and to answer questions touching matters properly being inquired into by the committee and to produce such books, papers, records and documents as the committee deems necessary. Such subpoenas may be served upon any person and shall have the force and effect

see a dangerous threat to government as we know it by acquiescing in this unprecedented usurpation.[2a]

I cannot accept the contention that all prior improprieties and illegalities are rectified by the ratifying vote of the electorate.[3] Procedures in government instituted for the protection of the mass of people are designated to

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of subpoenas issued out of the courts of this Commonwealth. . . . The committee may request and shall receive from any department, division, board, bureau, commission or agency of the State or any political subdivision thereof such facilities, assistance and data as it deems necessary or desirable to carry out properly its powers and duties. The committee is hereby authorized and empowered to make and sign any agreements, and to do and perform any acts that may be necessary, desirable or proper to carry out the provisions of this act. The committee shall also prepare budgets for the holding of the constitutional convention. . . ."

2a. ". . . Common sense would indicate that delegates intended to represent, first, the electoral body, and, through that, the sovereign, if they are to represent truly the different phases of opinion current among the people at large, should be *chosen by the entire electoral body*. . . ." (Emphasis supplied). Jameson, Constitutional Conventions, page 258 (4th ed. 1887). No precedent can be found in any authority on constitutional conventions for the inclusion of *ex officio* members.

3. The "People's Convention" of Rhode Island in 1841 as described in *Luther v. Borden*, 7 How. 1 (1849), provides a useful analogy. Mass voluntary meetings were held in Providence which resulted in the appointing of a committee with the power to call a constitutional convention. The committee made the call, providing for full and free voting in Rhode Island. *The Constitution as prepared by the convention was approved by the majority of the voters of the state.* The existing government refused to leave office or to recognize the new because it would not recognize a convention that resulted from the call of a voluntary group. The President of the United States, John Tyler, recognized the existing government and offered military aid in putting down the "rebellious" insurgents. The Supreme Court held in *Luther v. Borden* that this was a proper function of the President and thus upheld his determination. The lesson to be learned from the Rhode Island experience is that the subsequent approval of a constitution by the populace does not cleanse the taint that surrounds the convention that evolved that constitution.

protect them from the rule of the majority. Our concepts of democracy and minority rights have far transcended the philosophy that "might makes right."

I dissent.

APPENDIX B-1.

IN THE

SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT.

No. 3, MAY TERM, 1969.

IRVIN STANDER AND ALEXANDER H. LINDSAY,
Appellants

v.

JOSEPH J. KELLEY, JR., SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM ORDER OF THE ORDER OF COMMON PLEAS OF DAUPHIN COUNTY AS OF NO. 197 COMMONWEALTH DOCKET 1968, NO. 2859, EQUITY DOCKET.

OPINION OF THE COURT.

BELL, *C. J.* FILED: OCTOBER 11, 1968

This is an appeal from an Order denying a preliminary injunction. In such a case, the issue before this Court and our scope of review is whether there was a clear abuse of discretion, or palpable legal error, and the merits of the case are not considered or decided: *City Line Open Hearth, Inc. v. Hotel, Motel & Club Employees' Union,* 413 Pa. 420, 436, 197 A. 2d 614; *McDonald v. Noga,* 393 Pa. 309, 311, 141 A. 2d 842.

In *McDonald v. Noga,* 393 Pa., supra, the Court said (page 311):

"On an appeal from a decree granting or refusing a preliminary injunction, the appellant has a very heavy burden to overcome; such a decree will not be interfered with upon appellate review in the absence of a plain abuse of discretion by the court below: Aldrich v. Geahry, 360 Pa. 376, 379, 61 A. 2d 843. . . ."

In *City Line Open Hearth, Inc. v. Hotel, Motel & Club Employees' Union,* 413 Pa., supra, the Court said (page 436):

"On an appeal from the grant or refusal of a preliminary injunction, the test in this Court is well settled. We consider and *decide, not the merits of the merits of the case** but only whether there were *any apparently reasonable or justifiable grounds*** for the action of the Court below; and if such exists, the Decree (or Order) will be affirmed unless the record presents palpable legal error: Philadelphia v. Philadelphia Transportation Co., 386 Pa. 231, 236, 126 A. 2d 132; see also Hader v. Coplay Cement Mfg. Co., 410 Pa. 139, 145, 189 A. 2d 271; Sherwood v. Elgart, 383 Pa. 110, 117 A. 2d 899; Alabama Binder & Chemical Corp. v. Pennsylvania Industrial Chemical Corp., 410 Pa. 214, 189 A. 2d 180; Lindenfelser v. Lindenfelser, 385 Pa. 342, 123 A. 2d 626."

We place our decision on the well recognized ground that there was no clear abuse of discretion, or palpable legal error.

Order affirmed, each party to pay own costs.

Mr. Justice JONES files a concurring Opinion. Mr. Justice EAGEN files a concurring Opinion. Mr. Justice MUSMANNO files a dissenting Opinion.

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* Italics, ours.

** Italics in original Opinion.

APPENDIX B-2.

IN THE

SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT.

No. 3, MAY TERM, 1969.

IRVIN STANDER AND ALEXANDER H. LINDSAY,
Appellants

v.

JOSEPH J. KELLEY, JR., SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM ORDER OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY AS OF NO. 197 COMMONWEALTH DOCKET 1968, NO. 2859, EQUITY DOCKET.

CONCURRING OPINION.

JONES, *J.* FILED: OCTOBER 11, 1968

I would affirm the decree of the court below which denied injunctive relief. However, in so doing, I neither consider nor determine the *merits* of the issues raised in the court below.

Affirmance of this decree seems mandated for two reasons. First, the relief sought in the court below was to restrain submission to the electorate at the Primary Election of April 23, 1968 for approval or disapproval of

certain amendments to our Constitution; such election has been held, the relief sought cannot be now granted and we, therefore, are presented with no justiciable controversy on this appeal. Second, it has long been the established and salutary rule that on an appeal from the denial of a preliminary injunction the appellate court will not reverse if there existed *any* reasonable ground to sustain the denial of injunctive relief and the court below did not commit any *palpable* error of law. See: *City Line Open Hearth, Inc. v. Hotel, Motel & Club Employees' Union*, 413 Pa. 420, 197 A. 2d 614 (1964); *McGinley v. Scott*, 401 Pa. 310, 164 A. 2d 424 (1960). The court below did have a reasonable ground for and committed no palpable legal error in denying injunctive relief.

I would affirm the decree without prejudice to appellants to raise any issues involving the merits of this controversy in another more appropriate proceeding.

APPENDIX B-3.

IN THE

SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

No. 3 MAY TERM, 1969

IRVIN STANDER AND ALEXANDER H. LINDSAY,
Appellants

v.

JOSEPH J. KELLEY, JR.,
SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM DECREE OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY AS OF NO. 197 COMMONWEALTH DOCKET 1968, NO. 2859, EQUITY DOCKET.

CONCURRING OPINION.

EAGEN, *J.*: FILED: October 11, 1968

I am of the view that the lower court had apparent reasonable ground for refusing a preliminary injunction in this case and, therefore, under the long established rule limiting our scope of review, we must affirm. However, the case presents serious questions which should be resolved without further undue delay. This can be accomplished by this Court assuming original jurisdiction and issuing the special writ of certiorari requested in a related case.

I earnestly urge the Court to grant the Writ and schedule argument thereon at the earliest possible date.

APPENDIX B-4.

IN THE

SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

No. 3 MAY TERM, 1969

IRVIN STANDER AND ALEXANDER H. LINDSAY,
Appellants

v.

JOSEPH J. KELLEY, JR.,
SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA

No. 390, MISCELL. DOCKET

IRVIN STANDER AND ALEXANDER H. LINDSAY
Appellants

v.

JOSEPH J. KELLEY, JR.
SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM DECREE OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY AS OF No. 197 COMMONWEALTH DOCKET 1968, No. 2859, EQUITY DOCKET.

DISSENTING OPINION.

MUSMANNO, *J.*

I dissent in these cases from the decisions of this Court affirming the decree of the Court of Common Pleas of

Dauphin County and refusing the petition for the issuance of a special writ of certiorari for original jurisdiction. Since both actions involve the same subject matter I will write only one Opinion which will apply to both proceedings.

My learned Brother Jones in his Concurring Opinion in the Dauphin County case states that he affirms without prejudice to the appellants "to raise any issues involving the merits of this controversy in another more appropriate proceeding." I interpret this to mean that Justice Jones is not entirely satisfied that the new Judiciary Article conforms to established constitutional principles and therefore he is willing the appellant raise the issues in another future legal action.

I would meet the issue headon—now. It is much easier to straighten out a malforming constitutional structure while the concrete is wet then it would be after it has hardened into grotesque solidity. The time to straighten out a tree damaged in the planting is while it is still growing and not after it has attained a full but convoluted height.

The Constitutional Convention of 1968 (for convenience hereinafter referred to as the ConCon, the name by which it was constantly designated in the newspapers) exceeded its authority. It must never be overlooked that the ConCon was a limited convention, not a plenary one. It was bound by the Constitution of 1874 and had no authority whatsoever to go beyond the limitations spelled out in the Enabling Act No. 2 of March 15, 1967. That Act, approved by the people, specified the areas in which the ConCon could operate in the judicial field. Those areas were as conspicuously circumscribed as if they were surrounded by walls. The ConCon had no authority whatsoever to go beyond those walls. What were the circumscribed areas? ADMINISTRATION, ORGANIZATION, SELECTION, TENURE. The ConCon broke down those walls and trespassed into the

area of JURISDICTION, where it had no right to be *at all*. This is so fundamental and elementary that I cannot but be amazed that this Court treats the matter in so summary a fashion, especially since the ConCon's trespassing involves the very lifeblood of this Court itself, jurisdiction. The ConCon had no more right to change our jurisdiction than it would have had to legislate the judicial system to be inaugurated on the Moon if and when we land our valiant astronauts there.

Article V, Section 1 of the Constitution of 1874 declares the jurisdiction of this Court to be:

> "Article V. Section 3. The jurisdiction of the Supreme Court shall extend over the State, and the judges thereof shall, by virtue of and general jail delivery in the several counties; they shall have original jurisdiction in cases of injunction where a corporation is a party defendant, of habeas corpus, of mandamus to courts of inferior jurisdiction, and of quo warranto as to all officers of the Commonwealth whose jurisdiction extends over the State, but shall not exercise any other original jurisdiction; they shall have appellate jurisdiction by appeal, certiorari or writ of error in all cases, as is now or may hereafter be provided by law."

That Article was inviolable, it was sacred to the divine principles of justice, it was the altar on which rested the guarantees of the freedom of a free people. Because, talk as much as one may about liberty and the unfettered conscience of man, unless one has a court within which to demand those rights they may as well be printed on rubber balloons that waft into the empty air and blow away over the ocean of endless wastes.

The ConCon, although not empowered to touch the 1874 constitutional provision on judicial jurisdiction, not only touched it, but ripped it apart. It deprived our Court of

original jurisdiction over habeas corpus, quo warranto, mandamus, and corporate injunction cases. Under what authority? By what mandate? Ever since I had the honor of becoming a member of this Court, I have glowed inwardly in the realization that if anyone was unjustly imprisoned or deprived of his liberty, and no Common Pleas Court was open to issue a writ of habeas corpus, I was always available to unlock jail doors or sever the bonds of any illegal detention, but not now, according to ConCon.

Indeed, the writ of habeas corpus has completely disappeared from the Constitution, according to ConCon. Nowhere in the vast undulating prairie of its some 8000 words can one find a single blade of grass stamped *habeas corpus*, even though, dating as far back as Magna Charta, Habeas Corpus has always been the mightiest oak in the whole domain of individual rights.

It may be argued, and has been argued that the jurisdiction of the Courts, under the new judiciary article, remains as it was. But this is a play in dialectics because a Constitution speaks affirmatively and not negatively, it imparts principles of government by specific, objective statements, and not by inference. When the ConCon erased from the Constitution all language on the original jurisdiction of the Supreme Court and said, through Sec. 2(c) that the Supreme Court "shall have such jurisdiction as shall be provided by law," it made the Supreme Court subservient to the Legislature, this in violent violation of the basic principle of American government, that each of the three departments shall have sovereign authority unto itself.

But the supporters of the new Judiciary Article asserted and still assert that the Supreme Court retains its original jurisdiction and point to Section 10(c) which provides:

"(c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this Constitution *and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace* . . ." (Emphasis supplied.)

It will be noted by the italicized words that the Supreme Court becomes the servant of the Legislature. We have supreme power but it is the Legislature which determines jurisdiction. Why, jurisdiction is the very essence of judicial power! Take away jurisdiction and the courthouse becomes brick, motar and form.

Nor is the Supreme Court's jurisdiction saved by Section 1 of the Schedule to the Judiciary Article which states:

"The Supreme Court shall exercise all the powers and, until otherwise provided by law, jurisdiction now vested in the Supreme Court . . ."

Here again we have the limiting words unless "otherwise provided by law," that is, unless the Legislature determines to limit our jurisdiction. If the Legislature may limit our jurisdiction it may control the functions of the

Supreme Court. I must repeat my amazement that the majority of this Court can take so lightly such a hazard to the independent functioning of the highest Court in the Commonwealth.

In *Manges v. Dentler*, 33 Pa. 495, this Court, speaking through the distinguished Chief Justice Lowrie, said:

> ". . . These provisions are, therefore, imperative limitations of legislative authority, and imperative impositions of judicial duty. To the judiciary they say: —You shall administer justice to all men by due course of law, and without sale, denial, or delay; and to the legislature they say: —*You shall not intermeddle with such functions . . .*" *Menges v. Dentler*, 33 Pa. 498 (1859). (Emphasis supplied.)

The ConCon has intermeddled with jurisdictional functioning and that intermeddling should be declared unconstitutional—now!

The Pennsylvania Bar Association attempted to hold inviolate the separation of powers between the Legislative and Judicial Departments by its Delegate Proposal No. 1000 Section 2(b) and 14(b), which stated:

> "The Supreme Court shall be the highest court of the Commonwealth and shall have final appellate jurisdiction. It shall have no original jurisdiction except as may be expressly provided in this constitution. It may assume jurisdiction of actions pending in any other court at any stage of the proceedings. It shall have the power to issue all writs necessary or appropriate in aid of its appellate jurisdiction . . ."

> "The Supreme Court shall have power to prescribe rules in all civil and criminal actions and proceedings for all courts, governing administration, prac-

tice and procedure, including rules of evidence, appeals, appellate jurisdiction including time for appeals, and the issuance of all writs necessary or appropriate in aid of the jurisdiction of the respective courts. These rules shall have the force and effect inconsistent therewith."

Somehow these safeguards were washed overboard in the storm which engulfed the ConCon as it struggled to get into port before Adjournment Day.

The Pittsburgh Press, editorializing on the New Judiciary Article before adoption, declared that the invasion by the Legislative Department into the Judiciary Department of the State Government constituted a "fatal flaw" in the Judiciary Article. Its exposition is so able and so unanswerable in its logic that I incorporate it by reference into this Dissenting Opinion, a salient portion of which reads:

"It [the new Judiciary Article] could destroy the pattern of government which has served us throughout our history, the system of three independent, co-equal branches of government—the executive, legislative and judicial—all exercising separate powers defined in the constitution itself. It would do this by making the entire judicial establishment subservient to the Legislature. For no matter how you slice the 8190 words in this single proposal, this is what they spell.

"Unaccountably, the drafters of the judicial article failed to provide a guarantee of any specific powers for the State Supreme Court of any of the lower courts. In fact, adoption of this proposal would rub out even those provisions of the present constitution which specify the basic jurisdiction and powers of the

State Supreme Court. The proposal contains no language comparable to that of the U. S. Constitution which defines the jurisdiction and powers of the Federal Courts.

"In section after section, as applied to the State Supreme Court on down, the proposal states that the various courts shall have "such jurisdiction as shall be provided by law" or shall retain their present jurisdiction "until otherwise provided by law." In other words, the entire judicial system would be placed under the control of the Legislature."

I believe that it is the duty of this Court to take original jurisdiction at once of an issue which questions our very authority to function as an appellate court. Nothing could be more vital to the authority of this tribunal, which happens to be the oldest Supreme Court in the United States.

APPENDIX C.

IN THE

SUPREME COURT OF PENNSYLVANIA

No. 3 MAY TERM, 1969

ALEXANDER H. LINDSAY,

Appellant

v.

JOSEPH J. KELLEY, JR.,
SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Alexander Lindsay, appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Pennsylvania entered in this action on February 7, 1969. This appeal is taken pursuant to 28 USC 1257(2).

II. The Prothonotary of the Supreme Court of Pennsylvania will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include all of the record in possession, particularly the following:

1. All docket entries.
2. All opinions and orders of the Supreme Court of Pennsylvania, particularly those of October 11, 1968 and February 7, 1969.
3. All briefs of counsel.

III. The Prothonotary of the Commonwealth Court, Court of Common Pleas, Dauphin County, will please prepare a transcript of the record in this cause, captioned there Court of Common Pleas of Dauphin County at No. 197, Commonwealth Docket 1968, No. 2859 Equity Docket, for transmission to the Clerk of the Supreme Court of the United States and include therein any part of the record now in its possession which had been certified to the Supreme Court of Pennsylvania.

JAMES E. BEASLEY, ESQUIRE,
525 Broad Locust Building,
1405 Locust Street,
Philadelphia, Pa. 19102

PROOF OF SERVICE

I, James E. Beasley, Esquire, counsel for appellant, hereby certify that copies of this Notice of Appeals have been sent this 24th day of April, 1969, at 4:00 o'clock P. M., by registered mail to Joseph J. Kelly, Jr., Secretary of the Commonwealth of Pennsylvania, defendant and appellee, and Edward Friedman, Counsel General, and William C. Sennett, Attorney General, counsel for the appellee, and to Ira B. Tiger, Ralph S. Snyder, Samuel D. Slade and Bernard G. Segal, Esquires, counsel for Amicus Curiae, Pennsylvania Bar Association, at their registered office addresses.

JAMES E. BEASLEY.

SUPREME COURT, U. S.

FILED

JUN 7 1969

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

October Term, 1968
No. 1370

ALEXANDER H. LINDSAY,
Appellant

v.

JOSEPH J. KELLEY, JR., Secretary of the Commonwealth of Pennsylvania,
Appellee

On Appeal from the Supreme Court of Pennsylvania

MOTION TO DISMISS OR AFFIRM

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1370

ALEXANDER H. LINDSAY,
Appellant[1]

v.

JOSEPH J. KELLEY, JR., Secretary of the Commonwealth of Pennsylvania,
Appellee

On Appeal from the Supreme Court of Pennsylvania

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[1] The plaintiffs and appellants in the Supreme Court of Pennsylvania in the above case were Irvin Stander and Alexander H. Lindsay. The record does not disclose any reason for the elimination of the name of Irvin Stander from the caption as a party to the case.

MOTION TO DISMISS OR AFFIRM

Appellee moves that the present appeal be dismissed or that the final judgment of the Supreme Court of Pennsylvania in the present case be affirmed on the grounds that the Federal question presented is so unsubstantial as not to warrant argument thereon. Further that the appeal raises issues not averred in the pleadings in court below.

STATEMENT

On March 15, 1967, the General Assembly of the Commonwealth of Pennsylvania enacted Act No. 2 providing for the calling of a Constitutional Convention. That Act provided that the question as to whether a limited Constitutional Convention be convened should be submitted to the electorate at the primary election to be held in May, 1967. It specified the form of question to be voted upon by the electorate and defined the subject matter of the Constitution to be considered by the convention. The significant portion of the precise question specified by the Act and appearing on the ballot was:

> "Shall a constitutional convention be called in accordance with, and subject to, the limitations and requirements contained in Act Number 2 of the 1967 Session of the General Assembly, to prepare for submission to the electorate proposals for the revision of certain Articles of the State Constitution."[2]

[2] Appellant's appeal does not comprehend any issue of constitutionality. Its Notice of Appeal indicates that the same is from the decision of the Supreme Court of Pennsylvania at No. 3, May Term, 1969. That decision involved an adjudication confirming the action of the court below in refusing a preliminary injunction. The final order in said appeal was filed by the Supreme Court of Pennsylvania on October 11, 1968, seven months prior to the date of the filing of the said Notice of Appeal to the Supreme Court of the United States.

The official record of the Secretary of the Commonwealth of Pennsylvania discloses that 1,844,507 votes were cast on the question as to whether the convention should be convened; 1,141,931 votes being cast in favor and 703,576 against the calling of the convention.

The Act provided that the convention should consist of 163 delegates; three to be elected from each of the fifty senatorial districts in Pennsylvania and thirteen ex officio members of the General Assembly of the Commonwealth who would have the powers of elected delegates.[3] The convention was scheduled to and did convene on December 1, 1967, and completed its work February 29, 1968.

The entire thrust of appellant's complaint and argument is directed at the Judiciary Article (Article V) of the amended Constitution. The vote approving the Judiciary Article was 910,805 in favor and 729,845 against.

The sole reference to any issue of federal unconstitutionality appears in Paragraph 9 of appellant's complaint where he alleges as follows:

> "Plaintiffs are informed, believe, and therefore aver that Proposal No. 7, appearing as Ballot

[3] The ex officio delegates specified in Section 2 of Act No. 2 were to be the Lieutenant Governor, the President Pro-Tempore of the Senate, the Majority Leader of the Senate, the Majority Whip of the Senate, the Minority Leader of the Senate, the Minority Whip of the Senate, the Minority Caucus Chairman of the Senate, the Speaker of the House, the Majority Leader of the House, the Majority Whip of the House, the Minority Leader of the House, the Minority Whip of the House, and the Minority Caucus Chairman of the House.

> Question V, proposing an amendment to Article V of the Constitution is contrary to and violative of the constitutional guarantees of the separation and balance of legislative and judicial powers and beyond the scope of the convention's powers by effectively eliminating from the court of the Commonwealth all constitutional power."

Article V converted the fragmented and archaic court system of Pennsylvania into a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, Courts of Common Pleas, Community Courts, Municipal and Traffic Courts in the City of Philadelphia and such other courts as might be provided by law and Justices of the Peace. It specified that all courts be included in this unified judicial system.

It further designated the Supreme Court as the highest court of the Commonwealth "in which shall be reposed the supreme judicial power of the Commonwealth."

The new article further provided for the centralized administration of the court system of Pennsylvania under the general supervisory authority of the Supreme Court. It established a system of merit retention for judges; set up procedures for removal, suspension, discipline and compulsory retirement of judges and made major improvements in the minor judiciary system. It conferred broad powers to prescribe general rules governing practice, procedure and all court business upon the Supreme Court. It guaranteed due process appeals from all decisions of inferior courts. Its definition of the authority of the

Supreme Court was directed to the maintenance and protection of the authority, prestige and independence of the entire Pennsylvania judicial system. That authority is now more clearly spelled out in the Constitution of Pennsylvania than is the authority of the Supreme Court of the United States in the federal system.

ARGUMENT

The people of Pennsylvania, in the exercise of their sovereign powers, adopted certain amendments to their Constitution in 1968. They did not choose to pursue the amendment procedures spelled out in the Constitution, but instead, used the convention method—a perfectly proper and accepted means of amending constitutions and one which, in cases where the proposals are apt to be sweeping and controversial; as in this instance, is peculiarly appropriate. In taking this step, the people were exercising their highest political function, and to deny them the fruit of their labor would be to disfranchise them, and to disfranchise them would be to deny them a republican form of government as guaranteed by Art. 4, §4 of the United States Constitution. The convention was properly called by the people according to law and was legitimate in every aspect. However, even if the convention itself was illegitimate, upon the adoption of its proposals by the electorate, such proposals became valid as part of the fundamental law.[4]

Selection of Delegates

Appellant attempts to corrupt and distort the one man—one vote rule of your Honorable Court enunci-

[4] Jameson on Constitutional Conventions, §124.

ated in *Baker v. Carr*,[5] *Gray v. Sanders*,[6] *Reynolds v. Sims*[7] and *Lucas v. Colorado*.[8] He contends that the designation of thirteen elected members of the Pennsylvania General Assembly as ex officio members of the Convention violated that rule. He would place an advisory body authorized to make only recommendations in the same category as a body empowered to enact laws and ordinances. His position is clearly erroneous on two counts.

1. The one man—one vote rule has been strictly applied in all cases involving the election of members of legislative bodies whose function it is to enact legislation. It does not apply to committees or members of advisory bodies who are appointed to make recommendations for legislation. This is particularly true in a case as the present where the recommendations of the Convention are submitted to the people in whom is reposed the sovereign power for approval or rejection.

A convention cannot change anything. As John Randolph said of the Virginia Convention of 1829, a convention is called "as a state physician to propose remedies for the state's diseases." After it prescribes, it can perform no other function. Thereafter, the fate of its creation rests in the hands of the people. If they adopt its proposals, this then becomes the charter law and the courts may not disturb it. The convention has no binding authority, it proposes but

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[5] 369 U.S. 186, 82 S. Ct. 691.
[6] 372 U.S. 368, 83 S. Ct. 801.
[7] 377 U.S. 533, 84 S. Ct. 1362 (1964).
[8] 377 U.S. 713, 84 S. Ct. 1459 (1964).

the electorate disposes. It does not elect nor does it enact. It makes only recommendations.

Traditionally constitutional conventions are a part of our common law of government and, despite the existence of other modes of amendment, the convention method exists side-by-side with all other means. In other words, a constitutional convention called by the people, may propose charter changes, and the approval of such changes by those qualified to exercise the elective franchise is the assertion by the organized body politic of its choice. Since that body is vested with ultimate sovereignty, it has the power to control and alter at will the law which it originally created.

The apportionment cases above cited stand only for the proposition that the creation of legislative districts on any basis which does not provide equal weight to every ballot cast is the denial of the equal protection of the laws and consequently unconstitutional. No case denies the ultimate authority of the people to amend their constitution. *Lucas v. Colorado,* supra, recognized the right of the people to conclusively express their will through a referendum. That case is authority only for the proposition that the approval by the electorate will not validate a result which conflicts with constitutional provisions. In *Lucas,* it was not the method whereby the result was accomplished which was tainted, but the result itself.

Judge Thomas M. Cooley, in his famous work on *Constitutional Limitations*[9] layed down the rule that:

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[9] 8 Ed., Vol. I, Chap. III, p. 89.

> ". . . each State must judge for itself what provisions shall be inserted in its constitution; how the powers of government shall be apportioned in order to their proper exercise; what protection shall be thrown around the person or property of the citizen; and to what extent private rights shall be required to yield to the general good. And *the courts of the State, still more the courts of the Union, would be precluded from inquiring into the justice of their action, or questioning its validity, because of any supposed conflict with fundamental rules of right or of government, unless they should be able to show collision at some point between the instrument thus formed and that paramount law which constitutes, in regard to the subjects it covers, the fundamental rule of action throughout the whole United States.*" (Emphasis added.)

It must not be forgotten that the Constitution of the United States, Article 4, §6, provides that the United States shall guarantee to every State in the Union, a republican form of government. *Black's Constitutional Law*,[10] defines a republican form of government thus:

> "A republican government is one in which the powers of sovereignty are vested in the people and are exercised by the people either directly, or through representatives chose by the people to whom those powers are specially delegated."

In summary, it can be seen that the will of the people, properly ascertained, determines absolutely

[10] Ch. X, p. 309.

the frame of government, and with the exception that a state constitution cannot violate the national one, courts are powerless to interfere with the people's expressed wishes.

2. Of the utmost importance here is the fact that the calling of the Convention hinged upon the electorate's approval. It was not an arbitrary act of the Legislature not having the prior sanction of the sovereign. The people voted in favor of a convention "to be called in accordance with and subject to the limitations and requirements contained in Act No. 2." Among the essential provisions of that Act was the designation of thirteen ex officio members to the convention. These ex officio members were designated by a legislative body elected from and representing the entire electorate of Pennsylvania from districts which were defined under an apportionment plan prepared by the Supreme Court of Pennsylvania on February 4, 1966.[11] That apportionment was fixed strictly along the guidelines established by Baker, Reynolds and other pertinent decisions. An affirmative vote for the calling of the convention "in accordance with Act No. 2" was also a vote in favor of the thirteen ex officio delegates named therein.

The language of Chief Justice Bell in the opinion of the Supreme Court of Pennsylvania provides a complete answer to appellant's position. He stated:[12]

> "The function of the Constitutional Convention was to propose and *recommend* to the elec-

[11] *Butcher v. Bloom*, 420 Pa. 305.

[12] *Stander v. Kelley*, 433 Pa. 406 at 420.

torate of Pennsylvania changes and alterations in the existing State Constitution. The Convention had no law-making powers of any kind. Act No. 2, Sections 7, 8 and 9. The approval or disapproval of the Constitutional Convention's proposed amendments in April of 1968 was submitted to the electorate of Pennsylvania solely on a statewide basis, which is the purest form of "one man, one vote." If the convention which submitted the proposals did not represent all of the voters of the State equally, this defect was clearly cured by the approval of the voters at the April 28, 1968 statewide election.

We find no merit in this contention of appellants.

Since the delegates to the Constitutional Convention had no power to bind the people, and since a majority of the electorate of Pennsylvania voted to adopt the new Judiciary Article, the appellants cannot claim injury or Constitutional infirmity from the manner in which the delegates were chosen."

Appellant's position is predicated upon a completely erroneous conception of sovereignty. The true status of a convention is defined by Judge Cooley as follows:[13]

"The Constitutional Convention is a representative of sovereignty only in a very qualified sense, and for the specific purpose, and with the restricted authority to put in proper form

[13] Cooley's Constitutional Limitations, supra, Vol. I, p. 88.

the questions of amendment upon which the people are to pass; but the changes in the fundamental law of that state must be enacted by the people themselves."

Judicial v. Legislative Supremacy

Appellant suggests that the effect of the new Judiciary Article to the Pennsylvania Constitution is to nullify the authority of the judiciary and confer broad judicial authority upon the Pennsylvania Legislature. The language of Article V which is set forth in full in the Appendix attached hereto is sufficiently persuasive of its validity as to obviate the need for any elaborate argument in support thereof.[14] An examination of the provisions of this Article as previously briefly summarized illustrates the speciousness of this position and the impossibility of comprehension of his argument in support thereof.

None of the functions of the court have been taken away by the new Article V. A comparison of the provisions of the repealed Article V and the new Article V discloses that the new more clearly defines and protects the authority of the Supreme and inferior courts. The new Article V provides in Section 2 that:

"The Supreme Court of Pennsylvania shall be the highest court of the Commonwealth and

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[14] The Court's attention is specifically called to the powers conferred upon the courts by Sections 1, 2, 9, 10 and 11 of Article V.

in this court shall be reposed the supreme judicial power of the Commonwealth."

No language more clearly establishes and protects the jurisdiction of the Supreme Court of Pennsylvania and the perpetuation of all power necessary, proper, and incidental to the exercise thereof.

Nonjudicial authority pertaining to the courts has always been exercised by the Legislature. Its right to create statutory courts has never been denied. It may prescribe the rules of civil and criminal practice, which authority Article V now reposes in the Judiciary. It defines the areas of appellate jurisdiction, fixes procedures for and the time limits in which appeals may be taken, defines crimes, provides criminal penalties, and exercises numerous other powers incidental to the administration of justice. But it does not exercise any judicial function. It cannot hear cases or appeals, impose fines nor make any judicial determination of any kind.

While the doctrine of the separation of powers of the executive, legislative and judicial branches of government is fundamental to our concept of constitutional government, it must be recognized that this does not mean an absolute or completely sterile condition, for there is a necessary blending of powers in some areas. As pointed out by Professor Black,[15] the principle does not connote an absolute exclusion. For example, in the federal as well as most state governments, the executive takes part in legislation through periodic messages to the legislative branch and through

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[15] Black's Constitutional Law, §52.

the exercise of veto powers, the legislative department exercises judicial functions in removing public officers (including judges, at times) through impeachment proceedings in which one branch of the legislature acts as accuser and the other as judge, and the judiciary, of course, interprets the meaning and passes upon the constitutionality of legislative enactments.

What the doctrine of the separation of powers does mean is that no branch of government, except as permitted by the Constitution, may usurp any of the essential functions of another branch. With particular reference to this case, it would mean that the Legislature could not arrogate traditional judicial authority to itself.

Appellant lays considerable stress upon the courts' dependence upon the Legislature for jurisdiction, and in his blind passion against change, overlooks the circumstance that, with the exception of a very few enumerated powers set forth in the Constitution as it previously existed, the allocation of jurisdiction of various courts including the Supreme Court has always been made by the Legislature. This is likewise true with respect to the jurisdiction of Your Honorable Court.

A brief reference to the new Judiciary Article demonstrates that the changes made by it have brought about a wider gap between the Legislature and the courts. Article V, Section 10(c) confers the absolute power to prescribe rules governing the practice, procedure and conduct of all courts upon the Supreme Court. It may provide for assignment and reassign-

ment of actions and appeals among the several courts, admission to the Bar, the administration of all courts and supervision of all officers of the judicial branch. This new and extensive authority empowers the Supreme Court to exercise almost absolute control over judicial matters.

Under the previous constitution, the Legislature had the authority to establish judicial districts. As now provided (Art. V, §11) the number and boundaries of judicial districts may be changed only with the advice and consent of the Supreme Court.

The increased power of the Supreme Court is also reflected in the provisions of Article V, §7(b). While that section authorizes the legislature to establish classes of magisterial districts and fix the salaries of justices of the peace in each class, the number and boundaries of magisterial districts within each judicial district is a matter solely within the powers of the Supreme Court.

In summary, therefore, it appears that the amended Constitution of 1968 emphasizes and perpetuates the separation of powers principle. The Legislature has gained no new judicial powers but has lost its right to control the rule-making authority of the courts, the right to create judicial districts in low-populated counties and to attach contiguous districts without the consent of the Supreme Court; it has also lost the right to determine the wards, boroughs, townships and districts in which justices of the peace are to be elected, and which rights has passed to the Supreme Court. In addition thereto, it is now a specific provision of the Constitution that the Legislature may

not diminish the salaries of judges alone, whereas the proscription was a matter of judicial decision prior to the amendments.

For further elaboration as to the additional authority conferred upon the Supreme Court by the new Article V, see the opinion of Chief Justice Bell wherein he states:[16]

> "Generally speaking, the Executive Branch has the power to recommend legislation and the power and the duty to see that the laws are faithfully administered and carried out. The Legislative Branch has the power and the duty to pass legislation; and the Courts have the power, the duty and the responsibility of interpreting the Constitution and all legislation and determining whether legislation and presidential orders and all other questions and issues meet or violate the requirements of the Constitution."

Appellee calls specific attention to Article I, §11 of the Pennsylvania Constitution which provides that:

> "All courts shall be open, and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice, administered without sale, denial or delay."

It is thus abundantly clear that the courts retain their historical character as the ultimate and essential guardian of individual rights and that the courts of Pennsylvania shall and will continue to maintain their protection without interference from the Legislature.

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[16] *Stander v. Kelley*, supra at 422. Appellant's Jurisdictional Statement, p. 15a et seq.

CONCLUSION

Appellee respectfully requests that this subject be considered as promptly as possible in order to avoid any interference with the orderly administration of justice and the proper functioning of the courts within the Commonwealth of Pennsylvania.

Article V of the new Constitution became effective January 1, 1969. Prior and subsequent thereto various laws were enacted implementing those provisions thereof which were not self-executing. Among these are statutes providing for the right of appeal in all cases from courts of record, providing for right of appeal in all cases from adjudications of administrative agencies of political subdivisions and from adjudications of administrative agencies of the Commonwealth and from decisions of the minor judiciary, implementing provisions with respect to arbitration, establishing classes of magisterial districts, providing for the office of public defender and establishing community courts.

The Supreme Court has initiated action in fulfillment of its increased authority by appointing a court administrator and the establishment of the number and boundaries of new magisterial districts. A Judicial Inquiry and Review Board has been established. The various lower courts in the various judicial districts have been combined into the Courts of Common Pleas. Furthermore, those judges who previously sought re-election in 1969, are presently seeking retention on a merit basis rather than being required to

engage in partisan political campaigns. These few examples indicate the compelling necessity that there be prompt settlement of this issue so that all doubt as to the validity of the authority of the Pennsylvania courts be resolved.

Appellee submits that no issue of federal stature is pending before this Honorable Court. If the framing of an amendment to a constitution and the ratification thereof by the people were open to nullification on purely technical grounds including the makeup of the convention which drafted the proposals to be voted upon by the electorate, then the United States of America has been operating for over 180 years under an invalid constitution. The resolution of the Continental Congress which brought about the Constitutional Convention of 1787 did not call for a new charter or a new form of government; it expressly called for a revision of the Articles of Confederation. However, in complete disregard of the resolution, the Convention overhauled the existing form of government in its entirety, and constructed a new frame therefor, and this, in a sense, was both extra-legal and revolutionary. Not only this, but in virtual defiance of the amendment provisions of the Articles of Confederation which it was supposed to amend, the Convention provided (in Article VII) that the new constitution was to become effective when ratified by only nine states. This directly contravened Article XIII of the Articles of Confederation which required unanimous approval before any alteration could become effective.

The people of Pennsylvania have ratified and adopted the proposed constitutional amendments. They

have asserted their sovereign power to alter or amend their constitution and once having expressed their will through their franchise, no court should interfere therewith.

For the foregoing reasons, it is respectfully submitted that the present appeal be dismissed, or that the final judgment of the Supreme Court of Pennsylvania be affirmed.

Respectfully submitted,
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APPENDIX

CONSTITUTION OF PENNSYLVANIA 1968

ARTICLE V
THE JUDICIARY

Unified Judicial System

Section 1. The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal and traffic courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace. All courts and justices of the peace and their jurisdiction shall be in this unified judicial system.

Supreme Court

Section 2. The Supreme Court (a) shall be the highest court of the Commonwealth and in this court shall be reposed the supreme judicial power of the Commonwealth;

(b) shall consist of seven justices, one of whom shall be the Chief Justice; and

(c) shall have such jurisdiction as shall be provided by law.

Superior Court

Section 3. The Superior Court shall consist of seven judges, one of whom shall be the President

judge, and its jurisdiction shall be as provided by law.

Commonwealth Court

Section 4. The Commonwealth Court shall be a State-wide court, and shall consist of the number of judges and have such jurisdiction as shall be provided by law. One of its judges shall be the president judge.

Courts of Common Pleas

Section 5. There shall be one court of common pleas for each judicial district (a) having such divisions and consisting of such number of judges as shall be provided by law, one of whom shall be the president judge; and

(b) having unlimited original jurisdiction in all cases except as may otherwise be provided by law.

Community Courts; Philadelphia Municipal Court and Traffic Court

Section 6. (a) In any judicial district a majority of the electors voting thereon may approve the establishment or discontinuance of a community court. Where a community court is approved, one community court shall be established; its divisions, number of judges and jurisdiction shall be as provided by law.

(b) The question whether a community court shall be established or discontinued in any judicial district shall be placed upon the ballot in a primary election by petition which shall be in the form prescribed by the officer of the Commonwealth who under law shall have supervision over elections. The

petition shall be filed with that officer and shall be signed by a number of electors equal to five percent of the total votes cast for all candidates for the office occupied by a single official for which the highest number of votes was cast in that judicial district at the last preceding general or municipal election. The manner of signing such petitions, the time of circulating them, the affidavits of the persons circulating them and all other details not contained herein shall be governed by the general laws relating to elections. The question shall not be placed upon the ballot in a judicial district more than once in any five-year period.

(c) In the City of Philadelphia there shall be a municipal court and a traffic court. The number of judges and the jurisdiction of each shall be as provided by law. These courts shall exist so long as a community court has not been established or in the event one has been discontinued under this section.

Justices of the Peace; Magisterial Districts

Section 7. (a) In any judicial district, other than the City of Philadelphia, where a community court has not been established or where one has been discontinued there shall be one justice of the peace in each magisterial district. The jurisdiction of the justice of the peace shall be as provided by law.

(b) The General Assembly shall by law establish classes of magisterial districts solely on the basis of population and population density and shall fix the salaries to be paid justices of the peace in each class. The number and boundaries of magisterial districts of

each class within each judicial district shall be established by the Supreme Court or by the courts of common pleas under the direction of the Supreme Court as required for the efficient administration of justice within each magisterial district.

Other Courts

Section 8. The General Assembly may establish additional courts or divisions of existing courts, as needed, or abolish any statutory court or division thereof.

Right of Appeal

Section 9. There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

Judicial Administration

Section 10. (a) The Supreme Court shall exercise general supervisory and administrative authority over all the courts and justices of the peace, including authority to temporarily assign judges and justices of the peace from one court or district to another as it deems appropriate.

(b) The Supreme Court shall appoint a court administrator and may appoint such subordinate administrators and staff as may be necessary and proper for the prompt and proper disposition of the business of all courts and justices of the peace.

(c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.

(d) The Chief Justice and president judges of all courts with seven or less judges shall be the justice or judge longest in continuous service on their respective courts; and in the event of his resignation from this position the justice or judge next longest in continuous service shall be the Chief Justice or president judge. The president judges of all other courts shall be selected for five-year terms by the members of their respective courts, except that the president judge of the traffic court in the City of Philadelphia shall be appointed by the Governor. Chief Justice or president judge may resign such position and remain a member of the court. In the event of a tie vote for office of president judge in a court which elects its

president judge, the Supreme Court shall appoint as president judge one of the judges receiving the highest number of votes.

(e) Should any two or more justices or judges of the same court assume office at the same time, they shall cast lots forthwith for priority of commission, and certify the results to the Governor who shall issue their commissions accordingly.

Judicial Districts; Boundaries

Section 11. The number and boundaries of judicial districts shall be changed by the General Assembly only with the advice and consent of the Supreme Court.

Qualifications of Justices, Judges and Justices of the Peace

Section 12. (a) Justices, judges and justices of the peace shall be citizens of the Commonwealth. Justices and judges, except the judges of the traffic court in the City of Philadelphia, shall be members of the bar of the Supreme Court. Justices and judges of state-wide courts, for a period of one year preceding their election or appointment and during their continuance in office, shall reside within the Commonwealth. Other judges and justices of the peace, for a period of one year preceding their election or appointment and during their continuance in office, shall reside within their respective districts, except as provided in this article for temporary assignments.

(b) Judges of the traffic court in the City of Philadelphia and justices of the peace shall be mem-

bers of the bar of the Supreme Court or shall complete a course of training and instruction in the duties of their respective offices and pass an examination prior to assuming office such courses and examinations shall be as provided by law.

Election of Justices, Judges and Justices of the Peace; Vacancies

Section 13. (a) Justices, judges and justices of the peace shall be elected at the municipal election next preceding the commencement of their respective terms of office by the electors of the Commonwealth or the respective districts in which they are to serve.

(b) A vacancy in the office of justice, judge or justice of the peace shall be filled by appointment by the Governor. If the vacancy occurs during the session of the Senate, the appointment shall be with the advice and consent of two-thirds of the members elected to the Senate, except in the case of justices of the peace which shall be by a majority. If the vacancy occurs during sine die adjournment of the Senate such appointment shall not require the advice and consent of the Senate. The person so appointed shall serve for an initial term ending on the first Monday of January following the next municipal election more than ten months after the vacancy occurs.

(c) The provisions of section thirteen (b) shall not apply either in the case of a vacancy to be filled by retention election as provided in section fifteen (b). In case of a vacancy created by failure of a justice or judge to file a declaration for retention election as provided in section fifteen (b). In case of a vacan-

cy occurring at the expiration of an appointive term under section thirteen (b), the vacancy shall be filled by election as provided in section thirteen (a).

(d) At the primary election in 1969, the electors of the Commonwealth may elect to have the justices and judges of the Supreme, Superior, Commonwealth and all other statewide courts appointed by the Governor from a list of persons qualified for the offices submitted to him by the Judicial Qualifications Commission. If a majority vote of those voting on the questions is in favor of this method of appointment, then whenever any vacancy occurs thereafter for any reason in such court, the Governor shall fill the vacancy by appointment in the manner prescribed in this subsection. Such appointment shall not require the consent of the Senate.

(e) Each justice or judge appointed by the Governor under section thirteen (d) shall hold office for an initial term ending the first Monday of January following the next muncipal election more than twenty-four months following the appointment.

Judicial Qualifications Commission

Section 14. (a) Should the method of judicial selection be adopted as provided in section thirteen (d); there shall be a Judicial Qualifications Commission, composed of four non-lawyer electors appointed by the Governor and three non-judge members of the bar of the Supreme Court appointed by the Supreme Court. No more than four members shall be of the same political party. The members of the commission shall serve for terms of seven years, with one

member being selected each year. The commission shall consider all names submitted to it and recommend to the Governor not fewer than ten nor more than twenty of those qualified for each vacancy to be filled.

(b) During his term, no member shall hold a public office or public appointment for which he receives compensation, nor shall he hold office in a political party or political organization.

(c) A vacancy on the commission shall be filled by the appointing authority for the balance of the term.

Tenure of Justices, Judges and Justices of the Peace

Section 15. (a) The regular term of office of justices and judges shall be ten years and the regular term of office for judges of the municipal court and traffic court in the City of Philadelphia and of justices of the peace shall be six years. The tenure of any justice or judge shall not be affected by changes in judicial districts or by reduction in the number of judges.

(b) A justice or judge elected under section thirteen (a), appointed under section thirteen (d) or retained under this section fifteen (b) may file a declaration of candidacy for retention election with the officer of the Commonwealth who under law shall have supervision over elections on or before the first Monday of January of the year preceding the year in which his term of office expires. If no declaration is filed, a vacancy shall exist upon the expiration of the term of office of such justice or judge, to be filled by elec-

tion under section thirteen (a) or by appointment under section thirteen (d) if applicable. If a justice or judge files a declaration, his name shall be submitted to the electors without party designation, on a separate judicial ballot or in a separate column on voting machines, at the municipal election immediately preceding the expiration of the term of office of the justice or judge, to determine only the question whether he shall be retained in office. If a majority is against retention, a vacancy shall exist upon the expiration of his term of office, to be filled by appointment under section thirteen (b) or under section thirteen (d) if applicable. If a majority favors retention, the justice or judge shall serve for the regular term of office provided herein, unless sooner removed or retired. At the expiration of each term a justice or judge shall be eligible for retention as provided herein, subject only to the retirement provisions of this article.

Compensation and Retirement of Justices, Judges and Justices of the Peace

Section 16. (a) Justices, judges and justices of the peace shall be compensated by the Commonwealth as provided by law. Their compensation shall not be diminished during their terms of office, unless by law applying generally to all salaried officers of the Commonwealth.

(b) Justices, judges and justices of the peace shall be retired upon attaining the age of seventy years. Former and retired justices, judges and justices of the peace shall receive such compensation as shall be provided by law. No compensation shall be paid to any

justice, judge or justice of the peace who is suspended or removed from office under section eighteen of this article or under article six.

(c) A former or retired justice or judge may, with his consent, be assigned by the Supreme Court on temporary judicial service as may be prescribed by rule of the Supreme Court.

Prohibited Activities

Section 17. (a) Justices and judges shall devote full time to their judicial duties, and shall not engage in the practice of law, hold office in a political party or political organization, or hold an office or position of profit in the government of the United States, the Commonwealth or any municipal corporation or political subdivision thereof, except in the armed service of the United States or the Commonwealth.

(b) Justices and judges shall not engage in any activity prohibited by law and shall not violate any canon of legal or judicial ethics prescribed by the Supreme Court. Justices of the peace shall be governed by rules or canons which shall be prescribed by the Supreme Court.

(c) No justice, judge or justice of the peace shall be paid or accept for the performance of any judicial duty or for any service connected with his office, any fee, emolument of perquisite other than the salary and expenses provided by law.

(d) No duties shall be imposed by law upon the Supreme Court or any of the justices thereof or the Superior Court or any of the judges thereof, except

such as are judicial, nor shall any of them exercise any power of appointment except as provided in this Constitution.

Suspension, Removal, Discipline and Compulsory Retirement

Section 18. (a) There shall be a Judicial Inquiry and Review Board having nine members as follows: three judges of the courts of common pleas from different judicial districts and two judges of the Superior Court, all of whom shall be selected by the Supreme Court; and two non-judge members of the bar of the Supreme Court and two non-lawyer electors, all of whom shall be selected by the Governor.

(b) The members shall serve for terms of four years, provided that a member, rather than his successor, shall continue to participate in any hearing in progress at the end of his term. A vacancy on the board shall be filled by the respective appointing authority for the balance of the term. The respective appointing authority may remove a member only for cause. No member shall serve more than four consecutive years; he may be reappointed after a lapse of one year. Annually the members of the board shall elect a chairman. The board shall act only with the concurrence of a majority of its members.

(c) A member shall not hold office in a political party or political organization. Members, other than judges, shall be compensated for their services as the Supreme Court shall prescribe. All members shall be reimbursed for expenses necessarily incurred in the discharge of their official duties.

(d) Under the procedure prescribed herein, any justice or judge may be suspended, removed from office or otherwise disciplined for violation of section seventeen of this article, misconduct in office, neglect of duty, failure to perform his duties, or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute and may be retired for disability seriously interfering with the performance of his duties.

(e) The board shall keep informed as to matters relating to grounds for suspension, removal, discipline, or compulsory retirement of justices or judges. It shall receive complaints or reports, formal or informal, from any source pertaining to such matters, and shall make such preliminary investigations as it deems necessary.

(f) The board, after such investigation, may order a hearing concerning the suspension, removal, discipline or compulsory retirement of a justice or judge. The board's orders for attendance of or testimony by witnesses or for the production of documents at any hearing or investigation shall be enforceable by contempt proceedings.

(g) If, after hearing, the board finds good cause therefor, it shall recommend to the Supreme Court the suspension, removal, discipline or compulsory retirement of the justice or judge.

(h) The Supreme Court shall review the record of the board's proceedings on the law and facts and may permit the introduction of additional evidence. It shall order suspension, removal, discipline or compulsory

retirement, or wholly reject the recommendation, as it finds just and proper. Upon an order for compulsory retirement, the justice or judge shall be retired with the same rights and privileges were he retired under section sixteen of this article. Upon an order for suspension or removal, the justice or judge shall be suspended or removed from office, and his salary shall cease from the date of such order. All papers filed with and proceedings before the board shall be confidential but upon being filed by the board in the Supreme Court, the record shall lose its confidential character. The filing of papers with and the giving of testimony before the board shall be privileged.

(i) No justice or judge shall participate as a member of the board or of the Supreme Court in any proceeding involving his suspension, removal, discipline or compulsory retirement.

(j) The Supreme Court shall prescribe rules of procedure under this section.

(k) The Supreme Court shall prescribe rule of procedure for the suspension, removal, discipline and compulsory retirement of justices of the peace.

(l) A justice, judge or justice of the peace convicted of misbehavior in office by a court, disbarred as a member of the bar of the Supreme Court or removed under this section eighteen shall forfeit automatically his judicial office and thereafter be ineligible for judicial office.

(m) A justice or judge who shall file for nomination for or election to any public office other than a

judicial office shall forfeit automatically his judicial office.

(n) This section is in addition to and not in substitution for the provisions for impeachment for misbehavior in office contained in article six. No justice, judge or justice of the peace against whom impeachment proceedings are pending in the Senate shall exercise any of the duties of his office until he has been acquitted.

SCHEDULE TO JUDICIARY ARTICLE

This schedule is a part of this judiciary article, and it is intended that the provisions contained herein shall have the same force and effect as those contained in the numbered sections of the article.

This article and schedule, unless otherwise stated herein, shall become effective on January 1, 1969. In this schedule where the word "now" quoted appears it speaks from the date of adoption of this schedule; where the word "present" appears it speaks from the effective date hereof.

Courts Other Than in the City of Philadelphia and Allegheny County

The Supreme Court

Section 1. The Supreme Court shall exercise all the powers and, until otherwise provided by law, jurisdiction now vested in the present Supreme Court and, until otherwise provided by law, the accused in all cases of felonious homicide shall have the right of appeal to the Supreme Court.

The Superior Court

Section 2. Until otherwise provided by law, the Superior Court shall exercise all the jurisdiction now vested in the present Superior Court. The present terms of all judges of the Superior Court which would otherwise expire on the first Monday of January in an odd-numbered year shall be extended to expire in the even-numbered year next following.

Commonwealth Court

Section 3. The Commonwealth Court shall come into existence on January 1, 1970. Notwithstanding anything to the contrary in this article, the General Assembly shall stagger the initial terms of judges of the Commonwealth Court.

The Courts of Common Pleas

Section 4. Until otherwise provided by law, the several courts of common pleas shall exercise the jurisdiction now vested in the present courts of common pleas. The courts of oyer and terminer and general jail delivery, quarter sessions of the peace, and orphan's courts are abolished and the several courts of common pleas shall also exercise the jurisdiction of these courts. Orphans' courts in judicial districts having separate orphans' courts shall become orphans' court divisions of the courts of common pleas and the court of common pleas in those judicial districts shall exercise the jurisdiction presently exercised by the separate orphans' courts through their respective orphans' court division.

Orphans' Court Judges

Section 5. In those judicial districts having separate orphans' courts, the present judges thereof shall

become judges of the orphans' court division of the court of common pleas and the present president judge shall become the president judge of the orphans' court division of the court of common pleas for the remainder of his term without diminution in salary.

Courts of Common Pleas in Multi-County Judicial Districts

Section 6. Courts of common pleas in multi-county judicial districts are abolished as separate courts and are hereby constituted as branches of the single court of common pleas established under this article in each such judicial district.

Community Courts

Section 7. In a judicial district which establishes a community court, a person serving as a justice of the peace at such time:

(a) May complete his term exercising the jurisdiction provided by law and with the compensation provided by law, and

(b) Upon completion of his term, his office is abolished and no judicial function of the kind heretofore exercised by a justice of the peace shall thereafter be exercised other than by the community court.

Justices, Judges and Justices of the Peace

Justices, Judges and Justices of the Peace

Section 8. Notwithstanding any provision in the article, a present justice, judge or justice of the peace may complete his term of office.

Associate Judges

Section 9. The office of associate judge not learned in the law is abolished, but a present associate judge may complete his term.

Retention Election of Present Justices and Judges

Section 10. A present judge who was originally elected to office and seeks retention in the 1969 municipal election and is otherwise eligible may file his declaration of candidacy by February 1, 1969.

Selection of President Judges

Section 11. Except in the City of Philadelphia, section ten (d) of the article shall become effective upon the expiration of the term of the present president judge, or upon earlier vacancy.

Magistrates, Aldermen and Justices of the Peace and Magisterial Districts Other Than in the City of Philadelphia

Magistrates, Aldermen and Justices of the Peace

Section 12. An alderman, justice of the peace or magistrate:

(a) May complete his term, exercising the jurisdiction provided by law and with the method of compensation provided by law prior to the adoption of this article;

(b) Shall be deemed to have taken and passed the examination required by this article for justices of the peace if he has completed one full term of office before creation of a magisterial district, and

(c) At the completion of his term, his office is abolished.

(d) Except for officers completing their terms, after the first Monday in January, 1970, no judicial function of the kind heretofore exercised by these officers, by mayors and like officers in municipalities shall be exercised by any officer other than the one justice of the peace elected or appointed to serve in that magisterial district.

Magisterial Districts

Section 13. So that the provisions of this article regarding the establishment of magisterial districts and the instruction and examination of justices of the peace may be self-executing, until otherwise provided by law in a manner agreeable to this article, the following provisions shall be in force:

(a) The Supreme Court or the courts of common pleas under the direction of the Supreme Court shall fix the number and boundaries of magisterial districts of each class within each judicial district by January 1, 1969, and these magisterial districts, except where a community court has been adopted, shall come into existence on January 1, 1970, the justices of the peace thereof to be elected at the municipal election in 1969. These justices of the peace shall retain no fine, costs or any other sum that shall be delivered into their hands for the performance of any judicial duty or for any service connected with their offices, but shall remit the same to the Commonwealth, county, municipal subdivision, school district or otherwise as may be provided by law.

(b) Classes of magisterial districts.

(i) Magisterial districts of the first class shall have a population density of more than five thousand persons per square mile and a population of not less than sixty-five thousand persons.

(ii) Magisterial districts of the second class shall have a population density of between one thousand and five thousand persons per square mile and a population of between twenty thousand persons and sixty-five thousand persons.

(iii) Magisterial districts of the third class shall have a population density of between two hundred and one thousand persons per square mile and a population of between twelve thousand persons and twenty thousand persons.

(iv) Magisterial districts of the fourth class shall have a population density of between seventy and two hundred persons per square mile and a population of between seven thousand five hundred persons and twelve thousand persons.

(v) Magisterial districts of the fifth class shall have a population density of under seventy persons per square mile and a population of between four thousand persons and seven thousand five hundred persons.

(c) Salaries of justices of the peace.

The salaries of the justices of the peace shall be as follows:

(i) In first class magisterial districts, twelve thousand dollars per year,

(ii) In second class magisterial districts, ten thousand dollars per year,

(iii) In third class magisterial districts, eight thousand dollars per year,

(iv) In fourth and fifth class magisterial districts, five thousand dollars per year.

(v) The salaries here fixed shall be paid by the State Treasurer and for such payment this article and schedule shall be sufficient warrant.

(d) Course of training, instruction and examination. The course of training and instruction and examination in civil and criminal law and procedure for a justice of the peace shall be devised by the Department of Public Instruction, and it shall administer this course and examination to insure that justices of the peace are competent to perform their duties.

Magisterial Districts

Section 14. Effective immediately upon establishment of magisterial districts and until otherwise prescribed the civil and criminal procedural rules relating to venue shall apply to magisterial districts; all proceedings before aldermen, magistrates and justices of the peace shall be brought in and only in a magisterial district in which occurs an event which would give rise to venue in a court of record; the court of common pleas upon its own motion or on application at any stage of proceedings shall transfer any proceeding in any magisterial district to the justice of the peace for the magisterial district in which proper venue lies.

Prothonotaries and Clerks Other Than in the City of Philadelphia

Prothonotaries, Clerks of Courts, Clerks of Orphans' Courts

Section 15. Until otherwise provided by law, the offices of prothonotary and clerk of courts shall become the offices of prothonotary and clerk of courts of the court of common pleas of the judicial district, and in multi-county judicial districts of their county's branch of the court of common pleas, and the clerk of the orphans' court in a judicial district now having a separate orphans' court shall become the clerk of the orphans' court division of the court of common pleas, and these officers shall continue to perform the duties of the office and to maintain and be responsible for the records, books and dockets as heretofore. In judicial districts where the clerk of the orphans' court is not the register of wills, he shall continue to perform the duties of the office and to maintain and be responsible for the records, books and dockets as heretofore until otherwise provided by law.

The City of Philadelphia

Courts and Judges

Section 16. Until otherwise provided by law: (a) the court of common pleas shall consist of a trial division, orphans' court division and family court division.

(b) The judges of the court of common pleas shall become judges of the trial division of the court

of common pleas provided for in this article and their tenure shall not otherwise be affected.

(c) The judges of the county court shall become judges of the family court division of the court of common pleas and their tenure shall not otherwise be affected.

(d) The judges of the orphans' court shall become judges of the orphans' court division of the court of common pleas and their tenure shall not otherwise be affected.

(e) As designated by the Governor, twenty-two of the present magistrates shall become judges of the municipal court and six shall become judges of the traffic court, and their tenure shall not otherwise be affected.

(f) One of the judges of the court of common pleas shall be president judge and he shall be selected in the manner provided in section ten (d) of this article. He shall be the administrative head of the court and shall supervise the court's judicial business.

(g) Each division of the court of common pleas shall be presided over by an administrative judge, who shall be one of its judges and shall be elected for a term of five years by a majority vote of the judges of that division. He shall assist the president judge in supervising the judicial business of the court and shall be responsible to him. Subject to the foregoing, the judges of the court of common pleas shall prescribe rules defining the duties of the administrative judges. The president judge shall have the power to assign judges from each division to each other division of

the court when required to expedite the business of the court.

(h) Until all members of the municipal court are members of the bar of the Supreme Court, the president judge of the court of common pleas shall appoint one of the judges of the municipal court as president judge for a five-year term or at the pleasure of the president judge of the court of common pleas. The president judge of the municipal court shall be eligible to succeed himself as president judge for any number of terms and shall be the administrative head of that court and shall supervise the judicial business of the court. He shall promulgate all administrative rules and regulations and make all judicial assignments. The president judge of the court of common pleas may assign temporarily judges of the municipal court who are members of the bar of the Supreme Court to the court of common pleas when required to expedite the business of the court.

(i) The Governor shall appoint one of the judges of the traffic court as president judge for a term of five years or at the pleasure of the Governor. The president judge of the traffic court shall be eligible to succeed himself as president judge for any number of terms, shall be the executive and administrative head of the traffic court, and shall supervise the judicial business of the court, shall promulgate all administrative rules and regulations, and shall make all judicial assignments.

(j) The exercise of all supervisory and administrative powers detailed in this section sixteen shall be subject to the supervisory and administrative control of the Supreme Court.

(k) The prothonotary shall continue to exercise the duties of that office for the trial division of the court of common pleas and for the municipal court.

(l) The clerk of quarter sessions shall continue to exercise the duties of that office for the trial division of the court of common pleas and for the municipal court.

(m) That officer serving as clerk to the county court shall continue to exercise the duties of that office for the family division of the court of common pleas.

(n) The register of wills shall serve ex officio as clerk of the orphans' court division of the court of common pleas.

(o) The court of common pleas shall have unlimited original jurisdiction in all cases except those cases assigned by this schedule to the municipal court and to the traffic court. The court of common pleas shall have all the jurisdiction now vested in the court of common pleas shall have all the jurisdiction now vested in the court of common pleas, the court of oyer and terminer and general jail delivery, courts of quarter sessions of the peace, orphans' court, and county court. Jurisdiction in all of the foregoing cases shall be exercised through the trial division of the court of common pleas except in those cases which are assigned by this schedule to the orphans' court and family court divisions of the court of common pleas. The court of common pleas through the trial division shall also hear and determine appeals from the municipal court and traffic court.

(p) The court of common pleas through the orphans' court division shall exercise the jurisdiction heretofore exercised by the orphans' court.

(q) The court of common pleas through the family court division of the court of common pleas shall exercise jurisdiction in the following matters:

(i) Domestic Relations: desertion or nonsupport of wives, children and indigent parents, including children born out of wedlock; proceedings for custody of children; divorce and annulment and property matters relating thereto.

(ii) Juvenile Matters: dependent, delinquent and neglected children and children under eighteen years of age, suffering from epilepsy, nervous or mental defects, incorrigible, runaway and disorderly minors eighteen to twenty years of age and preliminary hearings in criminal cases where the victim is a juvenile.

(iii) Adoptions and Delayed Birth Certificates.

(r) The municipal court shall have jurisdiction in the following matters:

(i) Committing magistrates' jurisdiction in all criminal matters.

(ii) All summary offenses, except those under the motor vehicle laws.

(iii) All criminal offenses for which no prison term may be imposed or which are punishable by a term of imprisonment of not more than two years, and indictable offenses under the motor vehicle laws for which no prison term may be imposed or punishable by a term of imprisonment of not more than three

years. In these cases, the defendant shall have no right of trial by jury in that court, but he shall have the right of appeal for trial de novo including the right to trial by jury to the trial division of the court of common pleas. Until there are a sufficient number of judges who are members of the bar of the Supreme Court serving in the municipal court to handle such matters, the trial division of the court of common pleas shall have concurrent jurisdiction over such matters, the assignment of cases to the respective courts to be determined by rule prescribed by the president judge of the court of common pleas.

(iv) Matters arising under The Landlord and Tenant Act of 1951.

(v) All civil claims involving less than five hundred dollars. In these cases, the parties shall have no right of trial by jury in that court but shall have the right of appeal for a trial de novo including the right to trial by jury to the trial division of the court of common pleas, it being the purpose of this subsection to establish an expeditious small claims procedure whereby it shall not be necessary for the litigants to obtain counsel. This limited grant of civil jurisdiction shall be co-extensive with the civil jurisdiction of the trial division of the court of common pleas.

(vi) As commissioners to preside at arraignments, fix and accept bail, issue warrants and perform duties of a similar nature.

The grant of jurisdiction under clauses (iii) and (v) of this subsection may be exercised only by those judges who are members of the bar of the Supreme Court.

(s) The traffic court shall have exclusive jurisdiction of all summary offenses under the motor vehicle laws.

(t) The courts of oyer and terminer and general jail delivery, quarter sessions of the peace, the county court, the orphans' court and the ten separate courts of common pleas are abolished and their jurisdiction and powers shall be exercised by the court of common pleas provided for in this article through the divisions established by this schedule.

(u) The office of magistrate, the board of magistrates, and the present traffic court are abolished.

(v) Those judges appointed to the municipal court in accordance with subsection (e) of this section who are not members of the bar of the Supreme Court shall be eligible to complete their present terms and to be elected to and serve for one additional term, but not thereafter.

(w) The causes, proceedings, books, dockets and records of the abolished courts shall become those of the court or division thereof to which, under this schedule, jurisdiction of the proceedings or matters concerned has been transferred, and that court or division thereof shall determine and conclude such proceedings as if it had assumed jurisdiction in the first instance.

(x) The present president judges of the abolished courts and chief magistrate shall continue to receive the compensation to which they are now entitled as president judges and chief magistrate until the end of their present terms as president judges and chief magistrate respectively.

(y) The offices of prothonotary and register of wills in the City of Philadelphia shall no longer be considered constitutional offices under this article, but their powers and functions shall continue as at present until these offices are covered in the Home Rule Charter by a referendum in the manner provided by law.

(z) If a community court is established in the City of Philadelphia, a person serving as a judge of the municipal or traffic court at that time:

(i) Notwithstanding the provisions of subsection (v) of this section, may complete his term exercising the jurisdiction provided by law and with the compensation provided by law; and

(ii) At the completion of his term, his office is abolished and no jurisdiction of the kind exercised by those officers immediately after the effective date of this article and schedule shall thereafter be exercised other than by the community court.

Allegheny County

Courts

Section 17. Until otherwise provided by law:

(a) The court of common pleas shall consist of a trial division, an orphans' court division and a family court division; the courts of oyer and terminer and general jail delivery and quarter sessions of the peace, the county court, the orphans' court, and the juvenile court are abolished and their present jurisdiction shall be exercised by the court of common pleas. Until otherwise provided by rule of the court of common

pleas and, except as otherwise provided in this schedule, the court of common pleas shall exercise the jurisdiction of the present court of common pleas and the present county court through the trial division. Until otherwise provided by rule of the court of common pleas, the jurisdiction of the present orphans' court, except as otherwise provided in this schedule, shall be exercised by the court of common pleas through the orphans' court division.

(b) Until otherwise provided by rule of the court of common pleas, the court of common pleas shall exercise jurisdiction in the following matters through the family court division:

(i) Domestic Relations: Desertion or nonsupport of wives, children and indigent parents, including children born out of wedlock; proceedings, including habeas corpus, for custody of children; divorce and annulment and property matters relating thereto.

(ii) Juvenile Matters: All matters now within the jurisdiction of the juvenile court.

(iii) Adoptions and Delayed Birth Certificates.

Judges

Section 18. Until otherwise provided by law, the present judges of the court of common pleas shall continue to act as the judges of that court; the present judges of the county court shall become judges of the court of common pleas; the present judges of the orphans' court shall become judges of the orphans' court division of the court of common pleas; the present judges of the juvenile court shall become judges of the family court division of the court of common pleas.

President Judges

Section 19. The present president judge of the court of common pleas may complete his term as president judge; the present president judge of the orphans' court shall be the president judge of the orphans' court division of the court of common pleas for the remainder of his term as president judge, and the present president judge of the county court shall be the president judge of the family court division of the court of common pleas for the remainder of his term as president judge, all these without diminution of salary as president judge. The president judge of the trial division shall be selected pursuant to section twenty of this schedule.

President Judges; Court Divisions

Section 20. Until otherwise provided by law, the trial division, the orphans' court division and the family court division of the court of common pleas shall each be presided over by a president judge, who shall be one of the judges of such division and shall be elected for a term of five years by a majority vote of the judges of that division. He shall assist the president judge of the court of common pleas in supervising the judicial business of the court and shall be responsible to him. Subject to the foregoing, the judges of the court of common pleas shall prescribe rules defining the duties of the president judges. The president judge of the court of common pleas shall have the power to assign judges from one division to another division of the court when required to expedite the business of the court. The exercise of these supervisory and administrative powers, however, shall be subject to the supervisory and administrative powers of the Supreme Court.

The City of Pittsburgh

Inferior Courts

Section 21. Upon the establishment of magisterial districts pursuant to this article and schedule, and unless otherwise provided by law, the police magistrates, including those serving in the traffic court, the housing court and the city court shall continue as at present. Such magistrates shall be part of the unified judicial system and shall be subject to the general supervisory and administrative authority of the Supreme Court. Such magistrates shall be subject to the provisions of this article and schedule regarding educational requirements and prohibited activities of justices of the peace.

Causes, Proceedings, Books and Records

Causes, Proceedings, Books and Records

Section 22. All causes and proceedings pending in any abolished court or office of the justice of the peace shall be determined and concluded by the court to which jurisdiction of the proceedings has been transferred under this schedule and all books, dockets and records of any abolished court or office of the justice of the peace shall become those of the court to which, under this schedule, jurisdiction of the proceedings concerned has been transferred.

Commission and Board

Judicial Qualifications Commission

Section 23. The selection of the first members of the Judicial Qualifications Commission provided for

in section fourteen (a) of this article shall be made as follows: The Governor shall appoint the four non-lawyer members for terms of, respectively, one year, three years, five years and seven years, no more than two of whom shall be members of the same political party. The Supreme Court shall appoint the three non-judge members of the bar of the Supreme Court of Pennsylvania for terms, respectively, of two years, four years and six years, no more than two of whom shall be members of the same political party.

Judicial Inquiry and Review Board

Section 24. The selection of the first members of the Judicial Inquiry and Review Board shall be made as follows: one judge of the Superior Court, one non-judge member of the bar of the Supreme Court, and one non-lawyer member shall be selected for two-year terms; one judge of the Superior Court, one non-judge member of the bar of the Supreme Court, and one non-lawyer member shall be selected for four-year terms; one judge of the court of common pleas shall be selected for a term of two years, one for a term of three years, and one for a term of four years.

General Provisions

Dispensing With Trial by Jury

Section 25. Until otherwise provided by law, the parties, by agreement filed, may in any civil case dispense with trial by jury; and submit the decision of such case to the court having jurisdiction thereof, and such court shall hear and determine the same; and the judgment thereon shall be subject to writ of error as in other cases.

Writs of Certiorari

Section 26. Unless and until changed by rule of the Supreme Court, in addition to the right of appeal under section nine of this article, the judges of the courts of common pleas, within their respective judicial districts, shall have power to issue writs of certiorari to the municipal court in the City of Philadelphia, justices of the peace and inferior courts not of record and to cause their proceedings to be brought before them, and right and justice to be done.

Judicial Districts

Section 27. Until changed in accordance with section eleven of this article, the number and boundaries of judicial districts shall remain as at present.

Referendum

Section 28. The officer of the Commonwealth who under law shall have supervision over elections shall cause the question provided for in section thirteen (d) of this article to be placed on the ballot in the 1969 primary election throughout the Commonwealth.

Persons Specially Admitted by Local Rules

Section 29. Any person now specially admitted to practice may continue to practice in the court of common pleas or in that division of the court of common pleas and the municipal court in the City of Philadelphia which substantially includes the practice for which such person was previously specially admitted.

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IN THE

Supreme Court of the United States

October Term, 1968.

No. 1370.

ALEXANDER H. LINDSAY,

Appellant,

v.

JOSEPH J. KELLEY, JR.,
Secretary of the Commonwealth of Pennsylvania,

Appellee.

On Appeal From the Supreme Court of Pennsylvania.

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* ON BEHALF OF THE PENNSYLVANIA BAR ASSOCIATION IN SUPPORT OF MOTION TO DISMISS AND BRIEF *AMICUS CURIAE.*

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 1370.

ALEXANDER H. LINDSAY,

Appellant,

v.

JOSEPH J. KELLEY, JR., SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* ON BEHALF OF THE PENNSYLVANIA BAR ASSOCIATION IN SUPPORT OF MOTION TO DISMISS.

The Pennsylvania Bar Association respectfully requests leave to file a brief *amicus curiae* in support of the motion to dismiss in this proceeding. The brief *amicus curiae* is submitted with this motion.

The basis for the request is as follows. The Pennsylvania Bar Association has been the principal moving force in achieving constitutional reform in the Commonwealth

of Pennsylvania. As shown by the attached brief (pp. 2-7), the whole concept of constitutional revision which has now been overwhelmingly endorsed by the voters of the Commonwealth was initiated by the Pennsylvania Bar Association and brought to this successful conclusion with the aid of many other groups. The Pennsylvania Bar Association has participated in this proceeding, brought by disappointed opponents of constitutional reform, in the Pennsylvania courts and requests leave to continue that participation before this Court in order that the full history of the constitutional reform may be made available for the Court's consideration.

Respectfully submitted,

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June 6, 1969.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1370.

ALEXANDER H. LINDSAY,

Appellant

v.

JOSEPH J. KELLEY, JR., SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

BRIEF *AMICUS CURIAE* ON BEHALF OF THE PENNSYLVANIA BAR ASSOCIATION IN SUPPORT OF MOTION TO DISMISS.

STATEMENT.

Pursuant to Rule 42 of the Rules of this Court, the Pennsylvania Bar Association submits this Brief *amicus curiae* in support of appellee's Motion to Dismiss. As will appear from the History set forth below, the Pennsylvania Bar Association is vitally interested in the outcome of this proceeding.

A. History of Constitutional Reform in Pennsylvania.

The surge of constitutional reform, which has been so rampant throughout the twentieth century in most of the states in this country, was long overdue in reaching the Commonwealth of Pennsylvania. For over 90 years, Pennsylvania operated under constitutional provisions drafted by a Convention which concluded its work in 1873. These provisions, which went into effect on January 1, 1874, were highly restrictive in nature and largely unimaginative. With the population explosion, the growing complexity of industrial and commercial life, and the other developments of the Twentieth Century, the need for a complete overhaul of this Nineteenth Century document became apparent. But the people of Pennsylvania were unwilling to authorize the holding of an unlimited constitutional convention. On six separate occasions since January 1, 1874, the Pennsylvania Legislature submitted to the voters the question whether a constitutional convention should be called. Elections on this question were held in November 1891, in September 1921, in November 1924, in September 1935, in November 1953 and in November 1963. On each of these occasions, the question was rejected.

Thus, while the need for a general revision of this product of the horse and buggy age was becoming more and more pressing, it was apparent by the early 1960's that the constitutional convention route was not the one to follow.

Accordingly, the Pennsylvania Bar Association embarked upon "Project Constitution," an endeavor to overhaul the Pennsylvania Constitution on an article by article basis.[1]

1. Article XI, Section 1 of the Pennsylvania Constitution of 1874 provided that amendments would go into effect if adopted by two sessions of the legislature and then approved by the voters.

In 1963, the Pennsylvania Bar Association drafted 12 article by article amendments which, if adopted, would have completely modernized Pennsylvania's Constitution. These were introduced into the Pennsylvania Legislature in March 1963, but were shunted aside by the legislature at that time in favor of a bill calling for the sixth referendum on the question whether a Constitutional Convention should be held.

After the defeat of that question at the November 1963 election, the 12 proposed amendments were re-introduced at the 1964 session of the Pennsylvania Legislature. The 1964 Legislature adopted two of the amendments.[2] The 1965 session of the Legislature again adopted these two amendments and they came before the people at the 1966 elections—one in May and one in November—and were adopted by comfortable majorities.

In 1965, nine of the remaining 10 amendments were again introduced into the Legislature. Four of these amendments were adopted for the first time by the 1965 Session.

The Bar Association's amendments were again introduced into the 1966 Session (together with two supplemental amendments). The 1966 Legislature adopted for the first time three more of our amendments.

The seven amendments thus approved by the 1965 and 1966 Legislatures[3] were again adopted in the early days of the 1967 Session of the Legislature. They were submitted to the people at the May 1967 Primary Election at which time they were approved by the electorate.

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2. These amendments dealt with Public Officers and Private Corporations.

3. These amendments revised Articles relating to the Bill of Rights, the Legislature, Legislation, the Executive, Elections, and Future Amendments, and repealed in its entirety an obsolete Article on Railroads and Canals.

As a result of the foregoing, the Pennsylvania Constitution had been overhauled in all but four areas. These were Legislative Apportionment, the Judiciary, Taxation and State Finance, and Local Government.

As to these four crucial and highly controversial areas, a new approach was adopted by Governor Raymond P. Shafer. He urged legislation to authorize submission to the electorate at the May 1967 Primary of the question whether a limited Constitutional Convention should be called which would deal with these subjects and would submit proposals back to the voters for their approval.

The Pennsylvania Legislature complied with the Governor's request and, on March 15, 1967, adopted Act No. 2 of the 1967 session. The Act provided that, at the Primary Election to be held in May 1967, the following question would be submitted to the electorate:

> "Shall a constitutional convention be called in accordance with, and subject to, the limitations and requirements contained in Act Number 2 of the 1967 Session of the General Assembly, to prepare for submission to the electorate proposals for the revision of the subject matter of any amendment proposed, but not approved, at the May 1967 Primary and for the revision of Sections 16, 17 and 18 of Article II and of Articles V, XIII, XIV, XV and IX (excluding Section 18 and the Uniformity Clause of Section 1 of Article IX as provided in Section 7(B) of this Act)?"

Act No. 2 also provided the framework within which the Convention, if called, would act. It specified in Section 2 that, if a majority of the electors favored the holding of the limited Constitutional Convention, the Convention would consist of 163 delegates—150 elected district delegates and 13 ex-officio delegates who would have the powers of elected

delegates.[4] Sections 3 and 4 of the Act provided for the nomination and election of the district delegates. Section 5 contained provisions for a Preparatory Committee which would make arrangements for the Convention. Section 6 provided that the Convention would be in session from December 1, 1967 to February 29, 1968 and specified the nature of its organization. Section 7 set forth the substantive powers of the Convention and the limitations on those powers. Sections 8 and 9 prescribed the manner in which the Convention would submit its proposals to the electorate. Section 10 related to expenses of delegates, and Section 11 to registration of lobbyists. Section 12 provided that Convention sessions would be open to the public. Section 13 contained the effective date of the Act.

Between the passage of Act No. 2 on March 15, 1967 and the Primary Election held on May 16, 1967, there was widespread public discussion in Pennsylvania of the whole matter of amending the Constitution, with airing of positions, pro and con, on every conceivable aspect of the matter.

On May 16, 1967, the calling of the limited Constitutional Convention was approved by the voters.

In the summer of 1967, the Preparatory Committee held widely-publicized hearings at which interested organizations and persons submitted their views with regard to the various subjects with which the Convention would deal.

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4. The ex-officio delegates specified in Section 2 of Act No. 2 were to be the Lieutenant Governor, the President Pro-Tempore of the Senate, the Majority Leader of the Senate, the Majority Whip of the Senate, the Minority Leader of the Senate, the Minority Whip of the Senate, the Minority Caucus Chairman of the Senate, the Speaker of the House, the Majority Leader of the House, the Majority Whip of the House, the Minority Leader of the House, the Minority Whip of the House, and the Minority Caucus Chairman of the House.

Keeping the matter further in the public limelight was the election of the district delegates in November of 1967.

True to the mandate of Act No. 2, the Convention went into session on December 1, 1967, and continued in session until February 29, 1968. From the inception of the Convention until its conclusion, the Convention's deliberations and proceedings were held under the glare of publicity.

When the Convention concluded its deliberations, it came forth with a set of proposals which, while falling short of the reform objectives of many groups (including the Pennsylvania Bar Association), were nevertheless a vast improvement over what had existed before. For example, the Convention proposed a new Judiciary Article which established a system of merit retention (but not merit selection) of judges, provided for unification and centralized administration of Pennsylvania's court system, set up procedures for removal, suspension, discipline and compulsory retirement of judges, and made some major improvements in Pennsylvania's minor judiciary (although it failed to abolish the anachronistic Justice of the Peace system).

Acting in accord with the provisions of Sections 8 and 9 of the authorizing legislation, the officers of the Convention certified the Convention proposals to the Secretary of the Commonwealth, the Secretary advertised the proposals in at least two newspapers of general circulation in every county of the Commonwealth during the first week of April 1968, and the recommendations of the Convention were submitted to the electors for their approval or rejection on a separate ballot at the Primary Election held in April 1968.

The Convention's proposals were well publicized. Thousands of column inches of print were devoted to the Convention's work in newspapers throughout the State. The specific text of the final proposals was repeatedly placed

before the public, together with a multitude of analytical articles, comments, and editorials which explored every aspect of those proposals. Heavy emphasis was placed on the proposals with regard to the Judiciary Article.

Between March 1, 1968 and April 23, 1968 (the date of the Primary), the Voters' Guides of the League of Women Voters (which reach more than 2,500,000 voters in the Commonwealth of Pennsylvania) published the text of each of the Convention's proposals. In addition, the League distributed over a half million separate flyers obtained from the Convention itself, containing all of the proposals. Other public service groups engaged in similar activities. A specially-chartered corporation called "A Modern Constitution for Pennsylvania, Inc." distributed several hundred thousand flyers containing the text of the proposals. Approximately three million pamphlets containing the full text of the proposals were distributed throughout the public schools of the Commonwealth to be taken home by the school children for their parents.

At the Primary Election on April 23, 1968, the eligible voters of Pennsylvania approved all of the proposals of the Convention.

B. The Present Lawsuit.

On April 11, 1968, Irvin Stander and Alexander H. Lindsay, filed a taxpayers' Complaint in Equity against appellee, the Secretary of the Commonwealth of Pennsylvania, in which they sought to enjoin a vote by the electorate on the proposed Constitutional amendments R. 1a-8a).[5] The plaintiffs, in their Complaint, asserted that the proposed amendments were invalid for the following reasons:

5. "R" references are to the printed Record in the Supreme Court of Pennsylvania at No. 3, May Term 1969.

1. The amendments were violative of a provision of the Pennsylvania Constitution of 1874, which prohibits the submission of amendments more frequently than once in five years (Complaint, paragraph 5-6).

2. The qualified electorate of the Commonwealth had not been afforded an adequate opportunity to study and contemplate the proposed amendments because the amendments were not formally published until 18 days before the election and because events of "international magnitude"—the assassination of Dr. Martin Luther King, Jr., and the limited emergency conditions in Philadelphia and Pittsburgh—had intervened between March 1, 1968 and the date of the Primary Election (Complaint, paragraphs 7-8).

3. The provision of Section 8 of the enabling Act providing for advertisement of the Constitutional Convention's proposals during the first week in April 1968 was violative of a provision of the Pennsylvania Constitution of 1874 which provided for advertisement of proposed Constitutional amendments three months before the next general election (Complaint, paragraph 9).

4. The titles of certain of the proposed Constitutional amendments, as they appear on the Primary Election ballot, inadequately described the proposals, are misleading and are, therefore, "contrary to the laws of the Commonwealth and conscience" (Complaint, paragraph 10).

5. The proposal relating to the new Judiciary Article "is contrary to and violative of the constitutional guarantees of the separation and balance of legislative and judicial powers by effectively eliminating from the

courts of the Commonwealth all constitutional power." (Complaint, paragraph 11).

6. Act No. 2 of the 1967 session of the Pennsylvania Legislature was in itself an attempt to amend the Pennsylvania Constitution by providing a method of amending the Constitution not contemplated by the present Constitution (Complaint, paragraph 12).

The Complaint itself made not a single reference to the Constitution of the United States or any questions arising thereunder.

On April 11, 1968, the Court of Common Pleas of Dauphin County denied plaintiffs' prayer for a preliminary injunction (R. 9a-12a). The Supreme Court of Pennsylvania affirmed, holding that the Common Pleas Court had not abused its discretion in denying the requested preliminary injunction. **Stander v. Kelley**, 432 Pa. 1 (1968).[6]

Upon remand of the case to the Court of Common Pleas of Dauphin County, plaintiffs filed an amended Complaint (S. 4a-12a).[7] This time, however, plaintiffs directed their attack only at the new Judiciary Article of the Pennsylvania Constitution; they dropped their attack against the other four proposals. However, their claims of invalidity were, with two additions, identical to the claims that had been made before. These were that the Convention had not followed proper procedure in adopting certain provisions of the new Judiciary Article (Amended Complaint, paragraph 4) and that the new Judiciary Article was "beyond the scope of the convention's powers" (Amended Complaint, paragraph 9).

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6. Reprinted at pp. 28a-40a of the Jurisdictional Statement.

7. "S" references are to the printed Supplemental Record in the Supreme Court of Pennsylvania at No. 38, May Term 1969.

Once again, there was not a single reference in the Amended Complaint to the Constitution of the United States or any questions arising thereunder.

On November 26, 1968, the Court of Common Pleas of Dauphin County dismissed the Amended Complaint and entered judgment in favor of defendant-appellee (S. 17a-30a). The Supreme Court of Pennsylvania affirmed. **Stander v. Kelley**, 433 Pa. 406 (1969).[8] The Court held that the procedure followed—the calling of a limited Constitutional Convention pursuant to a mandate of the electorate and the approval of the proposals of the Convention by the electorate—was a perfectly permissible method of amending the Pennsylvania Constitution, that the Convention acted properly and within its authority, that the notice and advertisement of the Convention proposals were timely and adequate, that the electorate had ample opportunity to study and contemplate the proposed amendments, that the ballot was not misleading, and that the new Judiciary Article was in no sense violative of any Constitutional guarantees of separation of legislative and judicial powers. The Court also dismissed a contention raised by plaintiffs in their Brief and argument (but not in their pleadings) that the existence of non-elected delegates to the Convention was somehow violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

One of the plaintiffs has now appealed to this Court, asserting that the decision of the Supreme Court of Pennsylvania should be reversed because:

> 1. The presence of 13 ex-officio delegates to the convention deprived Pennsylvania residents of the equal protection of the laws.

8. Reprinted at pp. 1a-27a of the Jurisdictional Statement.

2. The new Pennsylvania Judiciary Article makes the jurisdiction of the Pennsylvania courts "subject to the will of the legislature" and is, therefore, contrary to the doctrine of separation of powers.

3. The procedure followed in adding the new Judiciary Article was contrary to the amendment procedure specified in the Pennsylvania Constitution.

We submit that these contentions are patently frivolous, that they do not present any substantial federal questions and that the appeal should be dismissed at the earliest possible moment.

Argument.

A. The Appeal Should Be Dismissed at the Earliest Possible Moment.

In the public interest, and in the interest of orderly administration of justice in the Commonwealth of Pennsylvania, there should be a prompt disposition of this challenge to Pennsylvania's new Judiciary Article.

In conformity with the time schedule specified in the new Judiciary Article of the Pennsylvania Constitution, the new Article went into effect on January 1, 1969. Many of its provisions have already been implemented and others are in the process of implementation. Unification and centralization of the Pennsylvania court system have now been accomplished. Pennsylvania's Orphans' Courts, Courts of Oyer and Terminer and General Jail Delivery, Courts of Quarter Sessions, the County Court of Philadelphia, the County Court of Allegheny County, and the Juvenile Court of Allegheny County have been abolished; the powers previously vested in these courts have now been placed in Courts of Common Pleas in each County. The Magistrates' Courts of Philadelphia have been replaced by a Traffic Court and a Municipal Court. The number and boundaries of new magisterial districts have been created throughout the Commonwealth. A Court Administrator has been appointed by the Supreme Court and has taken office. A Commonwealth Court is in the process of creation. A Judicial Inquiry and Review Board has been established and various other procedures mandated by the new Constitutional provisions have been put into effect. At the November 1969 election, a number of judges will come up for re-election on a merit basis.

The present case hangs as a cloud over all of these activities. It is imperative that it be disposed of as promptly as possible. If the new Judiciary Article is declared invalid, all of the steps that have been taken must somehow be undone and a reversion to the former constitutional provisions must take place. If we are correct in our contention that there is no substantial federal question presented by this case, public interest demands that there be a prompt dismissal of this appeal.

B. The Appeal Should Be Dismissed for Want of a Substantial Federal Question.

None of the issues raised by appellant presents a substantial federal question.

1. "Ex Office Delegates" (Jurisdictional Statement pp. 13-15).

Relying on **Baker v. Carr**, 369 U. S. 186 (1962), and its progeny,[9] appellant asserts that the presence of 13 ex-officio delegates at the Pennsylvania Constitutional Convention deprived Pennsylvania residents of the equal protection of the laws. The contention has no merit at all.

The teaching of **Baker v. Carr** and the other cases cited by appellant is that a State, in a statewide election, may not weigh the vote of one elector, or one class of electors, more heavily than the vote of any other elector, or class of electors. See *e.g.*, **Gray v. Sanders**, 372 U. S. 368, 379-80 (1963). But there is nothing in any of those cases that compels a State to provide for popular election of all of its public officials, or all of its legislators, or all of its constitutional convention delegates. As this Court noted in **Fortson v. Morris**, 385 U. S. 231, 233 (1966), the cases relied upon by

9 **Gray v. Sanders**, 372 U.S. 368 (1963); **Wesberry v. Sanders**, 376 U.S. 1 (1964); **Reynolds v. Sims**, 377 U.S. 533 (1964); **Lucas v. Colorado General Assembly**, 377 U.S. 713 (1964).

plaintiff were not "intended to compel a State to elect its governors or any other state officers or agents through elections of the people rather than through selections by appointment or elections by the State Assembly". In **Fortson,** the Court held that "there is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor." *Id.* at p. 234. Similarly, there is nothing in the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select delegates to a constitutional convention.

In the area where **Baker v. Carr** and its progeny are apposite, there was clearly no violation. At the May 1967 primary, where the calling of the Convention and its makeup were approved, each elector's vote had the same weight as the vote of every other elector in the State. At the November 1967 election, when district delegates were elected, each elector's vote carried the same weight as the vote of every other elector in the district.[10] And at the April 1968 primary election, when the Convention's proposals were approved, each elector's vote carried the same weight as the vote of every other elector in the State. The concept of "one man, one vote" was adhered to fully.

2. "Judicial v. Legislative Supremacy" (Jurisdictional Statement pp. 15-17).

Without citing a single decision of this Court, appellant argues that the new Judiciary Article deprives Pennsylvania residents of "rights * * * guaranteed by the Fourteenth Amendment of the United States Constitution" by somehow making the jurisdiction of the Pennsylvania Courts "subject to the will of the Legislature".

10. There is no contention that the districts were improperly apportioned.

This contention must fail for a number of reasons.

In the first place, the contention has not been properly raised. Nowhere in the proceedings in the State courts did appellant ever contend that the asserted shift of power from the judiciary to the legislature raised a federal question. "It is too late, of course, to raise the federal question for the first time in the notice of appeal to the Supreme Court or in the Jurisdictional Statement. Such papers are not part of the record of the state court proceedings and it is that record which must affirmatively show a raising of the federal issue." **Stern & Gressman, Supreme Court Practice** p. 99 (3d ed. 1962). The argument having not been made by appellant in the Pennsylvania courts and having not been actually decided by the Supreme Court of Pennsylvania, it cannot be entertained here. **Beck v. Washington**, 369 U. S. 541, 553-54 (1962).

Secondly, appellant's contention that there is a redistribution of power provided in the new Judiciary Article is based on a strained interpretation of the language of that article, an interpretation which the Supreme Court of Pennsylvania expressly refused to follow. As the Supreme Court of Pennsylvania noted in its opinion, the new Judiciary Article keeps the judicial powers of the Commonwealth in the courts; it specifically provides that "the judicial power of the Commonwealth shall be vested in a unified judicial system", that the Supreme Court "shall be the highest court of the Commonwealth and in this court shall be reposed the supreme judicial power of the Commonwealth", that "the Supreme Court shall exercise general supervisory and administrative authority over all the courts and justices of the peace", and that "the Supreme Court shall have the power to prescribe general rules governing practice, procedure, and the conduct of all courts". The fact that there are certain provisions in the new Judiciary Article relating to

jurisdiction of the courts which utilize language like "until otherwise provided by law" certainly does not, as appellants would have it, make the jurisdiction of the Pennsylvania courts "subject to the will of the Legislature".

Third, and finally, is the fact that even if the question were properly raised and even if the new Judiciary Article did subject the Pennsylvania Judiciary to the will of the Pennsylvania legislature, the question appellant seeks to raise is clearly precluded by prior decisions of this Court:

> "* * * The State has a wide discretion in respect to establishing its systems of courts and distributing their jurisdiction * * *". **Ohio v. Akron Park District,** 281 U. S. 74, 81 (1930).

> "* * * A state may, of course, distribute the functions of its judicial machinery as it sees fit. * * *" **Byrd v. Blue Ridge Rural Electric Cooperative,** 356 U. S. 525, 536 (1958).

> "* * * Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty. 'When we speak,' said Story, 'of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and

distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution.' Story's Const. (5th ed.) 393. Again: 'Indeed, there is not a single constitution of any State in the Union, which does not practically embrace some acknowledgement of the maxim, and at the same time some admixture of powers constituting an exception to it.' Story's Const. (5th ed.) 395." **Dreyer v. Illinois**, 187 U. S. 71, 84 (1902). See also **Carfer v. Caldwell**, 200 U. S. 293, 297 (1906).

Accordingly, it is clear that appellant's contention that Pennsylvania's new Judiciary Article is violative of the concept of separation of powers raises no substantial federal question.

3. "Abrogation of Pennsylvania Constitutional Protections" (Jurisdictional Statement pp. 17-20).

Appellant argues that the procedure followed in amending the Constitution was violative of certain provisions of the Pennsylvania Constitution of 1874. The Supreme Court of Pennsylvania has held to the contrary. Obviously, the question of interpreting the Pennsylvania Constitution is a matter for the Supreme Court of Pennsylvania, not this Court. "* * * [T]he courts of the State are the appropriate tribunals for the vindication of the state constitution and laws." **Carfer v. Caldwell**, 200 U. S. 293, 297 (1906). "* * * Whether state statutes shall be construed one way or another is a state question, the final

decision of which rests with the courts of the State. * * *" **Hebert v. Louisiana**, 272 U. S. 312, 316 (1926). See also **Chicago, M. St. P. & Pac. R. R. v. Risty**, 276 U. S. 567, 570 (1928); **Winters v. New York**, 333 U. S. 507, 514 (1948).

CONCLUSION.

It is obvious that the instant appeal raises no substantial federal questions. The appeal should be dismissed.

Respectfully submitted,

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June 6, 1969.

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IN THE

Supreme Court of the United States

October Term, 1968.

No. 1370.

ALEXANDER H. LINDSAY,
Appellant,

v.

JOSEPH J. KELLEY, JR.,
Secretary of the Commonwealth of Pennsylvania,
Appellee.

APPELLANT'S REPLY TO APPELLEE'S MOTION TO DISMISS AND REPLY TO MOTION OF THE PENNSYLVANIA BAR ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE.

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A. Contra Amicus "History of Constitutional Reform in Pa."

Characteristic of its position in this case, the Pennsylvania Bar Association has represented to this Court "facts" not of record, generalities and conclusions, the authenticity of which are in question. Appellant vigorously objects to the "History of Constitutional Reform in Pennsylvania" as simply not relevant to any Federal issue and largely inaccurate. The need for constitutional revision is not questioned by appellant. He simply believes with many

millions of Pennsylvanians that they were entitled to revision without retardation. Appellant and those interested in this case belong to no group of special interests and are unaffected by this litigation in any way other than as every other person in this Commonwealth. They strongly except to any inference to the contrary.

To be convinced of the need for deliberation and debate by an informed electorate one need only read the Bar Association's Brief p. 7 for the litany of political and social pressures brought to bear on the public during the eighteen frantic days between publication and vote.

Appellants and amicus have made the emotional appeal that much has been spent in effort and money to implement the new judiciary article. This may be true. But, it is a matter of no import when the loss is weighed against the value of the basic rights upon which this case pivots. By way of answer, we need only look at the segregation decisions of This Court. When the equal but separate facilities doctrine was declared unconstitutional, the economic loss to the South was enormous and regrettable but manifestly necessary. Certainly it could not be suggested that loss of money and inconvenience warranted the perpetuation of injustice.

B. All Federal Issues Were Before the Court Below.

As a hallmark of these inaccuracies, the Pennsylvania Bar Association categorically claims that "[t]he complaint itself made not a single reference to the Constitution of the United States or any questions arising thereunder" and "[o]nce again, there was not a single reference in the Amended Complaint to the Constitution of the United States or any questions arising thereunder." *Brief Amicus Curiae* pp. 9, 10. This is just not so. Had Bar Association counsel read the complaint, they would have discovered, as

did the Attorney General of Pennsylvania, that paragraph 9 of Appellant's Amended Complaint alleges:

> "Plaintiffs are informed, believe, and therefore aver that Proposal No. 7, appearing as Ballot Question V, proposing an amendment to Article V of the Constitution is contrary to and violative of the constitutional guarantees of the separation and balance of legislative and judicial power beyond the scope of the convention's powers by effectively eliminating from the court of the Commonwealth all constitutional power."

Appellees and amicus choose to ignore Briefs of counsel and the opinions below where it is evident that all issues in the jurisdictional statement were before the Pennsylvania Courts.[1] They ignore also that "[t]here can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Ralery v. State of Ohio*, 360 U. S. 423, 436, 79 S. Ct. 1257, 1265.[2]

C. Ex Officio Delegates.

Appellee and amicus misconstrue appellant's argument on the invasion into the convention by the thirteen non-elected delegates. They argue that since the conven-

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1. Without detailing all such references in the Court below, the following amply satisfy this inquiry:
   a. Ex-officio delegates violative of equal protection—Majority Opinion, Bell, C. J. (Jurisdictional Statement pp. 12a-14a) and Dissent of Cohen, J. (Jurisdictional Statement pp. 23a-27a)
   b. Due Process—Brief of Interested Person in Pennsylvania Supreme Court, attached hereto at pp. 1a-6a.
   c. Judicial v. Legislative Supremacy—appellants complaint and amended complaint ibid.

2. See also *Douglas v. State of Alabama*, 380 U. S. 423, 85 S. Ct. 1074 and *Manhattan Life Ins. Co. of New York v. Cohen*, 234 U. S. 123, 34 S. Ct. 874.

tion only "proposes", the people "dispose", this satisfies the equal protection requirements. This reasoning ignores the basic concept of equal protection. The wrong protected against is the "election" of disproportioned representatives. It is beyond argument that if a legislature allowed thirteen non-elected persons to participate as its leaders and organizers in its deliberations with full power to debate and vote, nothing could vitiate this misconduct. The violation is in the lack of "equal representation . . . for equal numbers of people . . ." *Wesberry v. Sanders,* 376 U. S. 1, 14 (1964).[3] No legerdemain or subsequent conduct can validate what had to be void at the outset.

Act No. 2 was the product of the Pennsylvania legislature and it became the mid-wife in delivering this Convention to the people. The legislature, not the convention, provided for the "13 ex officio delegates" and it is the constitutionality of Act No. 2 that is here in issue—not the debates in convention.

All delegates to this convention, except the ex officios, were *elected* at the general election in November, 1967 by the people of the Commonwealth and constituted an elected body sanctioned by the Commonwealth supposedly to speak on behalf of the people, in precisely the same way as the legislature. The convention performed exactly what the legislature could do, and did many times in the past,—submit constitutional amendments to the people. The appellee sees a distinction without a difference.

Justice Cohen perceived this and noted in his dissenting opinion:

> "Even if we ignore appellant's contention that Act No. 2 of the 1967 Session did not properly follow

3. Also, *Kirkpatrick v. Preisler, Henkel v. Prisler,* 394 U. S. 526, 89 S. Ct. 1225, and *Wells v. Rockefeller,* 394 U. S. 542, 89 S. Ct. 1234.

Article 18 of the 1874 Constitution, we must, nevertheless, determine whether a proper body for revision of the existing lawful frame of government was constituted by Act No. 2. I am constrained to hold that because section 2 of the Act provides for 13 *ex officio* members in addition to 150 elected delegates, that the *ex officio* members so dilute the elected body established for revision of the frame of government that it is not representative of the whole people and hence, unlawful and void. (Footnotes omitted.)

"The essence of a constitutional convention is only maintained if it represents the people. It is a substitute for the gathering of the entire populace. The presence of *ex officio* delegates exercising the full powers of elected delegates is foreign to the concept of a convention as a gathering of the people. Thus, there was no convention and nothing which flowed from it is valid even if the product of the convention is subsequently approved by the majority of the voters." (Supplemental Statement pp. 24a, 25a.)

Not only were these non-elected delegates permitted to debate and vote but by authority of Act No. 2 they constituted a Preparatory Committee with subpoena power to conduct ". . . broad studies, inquiries, surveys or analyses [they] may deem relevant . . ."[4] These stalwarts of the legislature were therefore not only delegates without a mandate but the clique which determined the subject matter and procedure for the convention.

As was further observed by Justice Cohen:

"I recognize that the leadership of the General Assembly that approved the Act held within their

4. For text, see Jurisdictional Statement p. 25a, footnote 2.

political power the 'yes' or 'no' on whether a constitutional convention should be called. But those in favor of a convention should not have surrendered the very essence of government in order to have the General Assembly pass the call. The cost was too high. It permitted the leadership of the General Assembly to become part of the convention without exposing themselves to the will of the people, and to influence, if not control, the convention's deliberations. (Footnote omitted.) I see a dangerous threat to government as we know it by acquiescing in this unprecedented usurpation. (Footnote omitted.)

"I cannot accept the contention that all prior improprieties and illegalities are rectified by the ratifying vote of the electorate. (Footnote omitted.) Procedures in government instituted for the protection of the mass of people are designated to protect them from the rule of the majority. Our concepts of democracy and minority rights have far transcended the philosophy that 'might makes right.'" (Jurisdictional Statement, pp. 25a to 27a).

D. Judicial v. Legislative Supremacy.

Again the Amicus brief incorrectly concluded that "[n]owhere in the proceedings in the state courts did appellant ever contend that the asserted shift of power from the judiciary to the legislature raised a federal question" and "[t]he argument having not been made by the Appellant in the Pennsylvania courts and having not been actually decided by the Supreme Court of Pennsylvania, it cannot be entertained here." *Brief Amicus Curiae,* p. 15. The complete answer to these baseless assertions is paragraph 9 of Appellant's Complaint; Appellant's brief in the

Supreme Court of Pennsylvania, p. 20 entitled "The Convention Acted Unconstitutionally by Usurping a Power Without the Limitations Placed upon it by the Enabling Act and, Further, by the Delegation of Power Given to the Judiciary in Violation of the Separation of Power Doctrine thus creating a Suzerainty of the Legislature over the Judiciary"; Appellant's Brief, p. 84, et seq. and the opinion of Chief Justice Bell, which states that "[a]ppellants vigorously urge this Court to declare the new Judiciary Article of the Pennsylvania Constitution null and void on the ground that it violates the traditional and fundamental concepts inherent in the separation of jurisdiction and powers among the three branches of our Republican Form of Government (Art. IV, Sec. 4, of the Constitution of the United States)." (Jurisdictional Statement, p. 14a). It was in light of this "vigorous" urging by Appellant that the Supreme Court of Pennsylvania went on to ". . . discuss specifically the provisions of the new Judiciary Article which are alleged to violate, obliterate and destroy the jurisdiction and the powers . . .", of the judiciary in Pennsylvania. (Jurisdictional Statement, p. 15a).

On the substantive issue appellees and amicus continue to misconstrue appellant's position. They talk of "Supreme Judicial Power" and all its trappings as being the complete answer. But nowhere in the arguments or analyses, including the opinions of the Supreme Court of Pennsylvania, has anyone answered the question posed by Section 10(c) of the amendments, which prohibits the Supreme Court of Pennsylvania from ". . . affect[ing] the right of the General Assembly to determine the jurisdiction of any court or justice of the peace . . ." (Jurisdictional Statement, p. 10).

Simply stated, these nineteen words create for the first time in American Jurisprudence an absolute control by the legislature over the judiciary. Other constitutions provide that the jurisdiction of Supreme Courts can be "provided by law". There is nothing exciting in this phrase. Should a legislature enact a statute detailing jurisdiction of a Supreme Court which offends either the state or federal constitutions, the court could simply rule it unconstitutional and void. There is a notable difference between the jurisdiction that is "provided by law" and Section 10(c) which prohibits the Supreme Court of Pennsylvania from "affect[ing] the right of the General Assembly to determine the jurisdiction of any court . . ." This clearly prevents the Supreme Court of Pennsylvania from reviewing any legislation "determining the jurisdiction of *any* court" (Emphasis ours). Consequently, the Pennsylvania legislature has the absolute, final and uncontestable right to decree by statute the jurisdiction of the Supreme Court of Pennsylvania and this statute cannot be reviewed by the Courts of Pennsylvania. This utterly destroys the "power" of the Supreme Court of Pennsylvania and the Republican Form of Government with its recognized separation of power.

By comparison, the broad vision of liberty and independence of the judiciary is most simply stated in the United States Constitution, granting "power" to the United States Supreme Court. (Article III, § 2.)

> "The Judicial Power shall extend to all cases in law and Equity, arising under this Constitution, the Laws of the United States and Treaties made or which shall be made, under their authority . . ."

Chief Justice Marshall described the meaning of Article III, Section 2, when he announced in *Marbury v. Madison,* 1 Cranch 137, 2 L. Ed. 60 (1803):

"If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunal in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If Congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction to be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is power without substance."

By definition, judicial power alone encompasses all power necessary to establish control over the orderly conduct of judicial inquiry. *McDonald v. Pless,* 238 U. S. 264, 265, 266 (1915); *Michaelson v. U. S.,* 266 U. S. 42, 65 (1924). Power without jurisdiction is legal castration—power and jurisdiction are inexorably intertwined, infused and ingrafted with one another and indispensably synonymous. Does it not become most clear then: no jurisdiction—no power.

Under these so-called proposals, no guarantee is spelled out; and, absent such direction there are no guarantees. Political discretion is a poor and meaningless substitute to accept in exchange for what has been taken from the people.

As this Court noted in *U. S. v. Hudson & Goodwin,* 7 Cranch 32, 33, 3 L. Ed. 259 (1812):

"If all the courts which the United States may, under their general powers, constitute, only one, the

Supreme Court possesses jurisdiction derived immediately from the Constitution, and which the legislative power cannot deprive it."

The late Justice Musmanno of the Pennsylvania Supreme Court in his dissenting opinion cogently faced this issue:

> "It will be noted by the italicized words [Sec. 10(c)] that the Supreme Court becomes the servant of the Legislature. We have supreme power but it is the Legislature which determines jurisdiction. Why, jurisdiction is the very essence of judicial power! Take away jurisdiction and the courthouse becomes brick, mortar and form.
>
> * * *
>
> "Here again we have the limiting words unless 'otherwise provided by law,' that is, unless the Legislature determines to limit our jurisdiction. If the Legislature may limit our jurisdiction it may control the functions of the Supreme Court. I must repeat my amazement that the majority of this Court can take so lightly such a hazard to the independent functioning of the highest Court in the Commonwealth." (Jurisdictional Statement, pp. 37a-38a).

There can be no argument under the language of the Judicial Article but that there is no guarantee to the citizens of the Commonwealth of Pennsylvania that there will be in existence any court in the Commonwealth with any jurisdiction. With specific reference to what should be the inviolate right of a citizen to a writ of habeas corpus, we see that by virtue of the language of the Judicial Article, there is no court anywhere in the Commonwealth that can be said

to provide a guarantee that it will be in existence with any jurisdiction to entertain a petition for a writ of habeas corpus. *This is a fatal defect in the Judiciary Article.*

This defect affects other freedoms as well. For instance, if there is no court guaranteed to enforce the right, then there can be no effective guarantee of "freedom of speech or of the press," or any other freedom now guaranteed to the people.

The Judiciary Article has completely subordinated the judicial branch of government to the legislature. In effect, it eliminates the judicial branch of government as a separate and independent branch of government. If the legislature has the sole determination of what jurisdiction all the courts of Pennsylvania have, then the judicial branch of government in effect becomes subservient to the legislature and becomes nothing more than a branch of the legislature. There remains in Pennsylvania only two independent and separate branches of government, i.e., the executive and legislative branches.

An independent judiciary is absolutely essential to our basic system of government. Its origin is in the Magna Carta and has enjoyed constitutional protection throughout our history.

E. Abrogation of Pennsylvania Constitutional Protections.

For a thorough understanding of the full significance of Section 10(c) it must be played against a background which recognizes that Act No. 2 authorized only a *limited* constitutional convention and the warrant from the people was severely restricted to "Judicial Administration, Organization, Selection and Tenure" and nothing more.

Any interpretations of the words, "Administration" and "Organization", as used in Act No. 2, ". . . shall be construed according to rules of grammar and according to

their common and approved usage". 46 P. S. 533.[5] If in fact an elector were so enterprising as to research the definitions of these terms in generally accepted dictionaries, he would have found that "administration" means the execution of public affairs as distinguished from policy making; performance of executive duties, the executive functions of government, both general and local, which are *neither legislative nor judicial.* "Organization" refers to the administrative and functional structure, the administrative personnel or apparatus of a business. *Webster's Seventh New Collegiate Dictionary,* G. & C. Merriam Co., p. 12,594 (1965), *American College Dictionary,* Random House, Inc., p. 16,854 (1966).[6]

What elector voting to authorize proposals restricted by "Administration", "Organizations", "Selection and Tenure" could possibly imagine that his constitutional guarantee of tripartite government was on the way out? Indeed, why did the warrant for the Judiciary Article refer to the four limited areas for consideration if it intended that jurisdiction of the judiciary was to be in any way affected? The only matters in Article V of the prior Constitution, which were not covered by the four specified subjects, concerned jurisdiction and jury trial. Indeed, unless the electorate was specifically intended to except jurisdiction and jury trial from the consideration of the conven-

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5. See also—*Commonwealth v. McHugh,* 406 Pa. 566 (1962); *Harris-Walsh, Inc. v. Borough of Dickson City,* 420 Pa. 258 (1966).

6. See *Black Law Dictionary,* West Publishing Co. p. 65 (1951). The term "Administration" has been defined as the managing or conduct of an office or employment; the performance of the executive duties of an institution, business or the like. *Webb v. Frohmiller,* 52 Ariz. 128, 79 P. 2d 510. "Organize" has been defined (*Black Law Dictionary, supra,* p. 1251) "to establish or furnish with organs; to systematize; to put into working order; to arrange in order for the normal exercise of its appropriate functions." *City of Beaumont Independent School District,* 164 S. W. 2d 253, 256.

tion, they would simply have been asked to give unlimited authority to consider Article V. This was not done.

The legerdemain of language which confronted the electors who voted on Act No. 2 consisted of the following, entitled "JUDICIARY—Ballot Question V":

> "Shall Proposal 7 on the JUDICIARY, adopted by the Constitutional Convention, establishing a unified judicial system, providing directly or through Supreme Court rules, for the qualifications, selection, tenure, removal, discipline and retirement of, and prohibiting certain activities by justices, judges, and justices of the peace, and related matters, be approved?"

This innocuous wording revealed no clue that the jurisdiction of the courts was at stake, that the independence of the judiciary was to be compromised, that the separation of power would be ended. Nowhere in the ballot question were the key words, "jurisdiction," "independent judiciary," or "separation of powers," to be found. Deliberate deception was perpetrated on the citizens. This represents a violation of due process under the federal constitution.

CONCLUSION.

It was the deliberate purpose of the founders of the American system to separate the powers of government and, so far as possible, to divide authority. This view of division and limitation in public power was clearly expressed by Jefferson:

> "All the powers of government—legislative, executive and judiciary—result in the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a

> plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those who doubt it turn their eyes on the republic of Venice. As little will it avail us that they are chosen by ourselves. An elective despotism was not the government we fought for, but one which should not only be founded on free principles, but in which the powers of government be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.[7]

The tactic of non-representative constitutional conventions organized and conducted at the will of the legislators with the support of restless majorities, is an enormous threat to individual freedom at the federal as well as the state level. It must now be put to an end.

It is respectfully requested that this Court return the people of Pennsylvania to equal status and forever declare these tactics of expediency anathema.

Respectfully submitted,

JAMES E. BEASLEY,
Attorney for Appellant.

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7. Works, 3:223.

EXCERPT FROM BRIEF OF INTERESTED PERSON IN PENNSYLVANIA SUPREME COURT.

III.

The Referendum on the Convention's Proposals Was Void Because It Was Not Authorized by a Valid Statute and Was Held in Disregard of the Mandates of the Constitution. It Was Also Void Because Inadequate Notice of the Precise Content of the Proposals Denied the People Due Process of Law.

Obviously, the "consent of the governed" cannot be lawfully or validly obtained if it is sought in a manner which violates either the State or Federal Constitution.

The only foundation for the referendum at the 1968 Primary is Act No. 2. *But the foundation crumbles, and with it the referendum, because the Act is plainly contrary to the Constitution.*

The Legislature, by Act No. 2, directed only one publication of the proposals during the first week in April, 1968, and further directed that the proposals be submitted to the electorate in the third week thereafter. But the Constitution, as interpreted by this Court in *Com. ex rel. Attorney General v. Beamish,* 309 Pa. 510, mandates repeated publication, once a month for three months before the election is held. The conflict between the Act and the Constitution is clear and irreconcilable.

As was said in this Court in *Com. ex rel. Smillie v. McElwee,* 327 Pa. 148, 160:

> "Whenever any act conflicts with *any* section of the fundamental law, it is entitled to no further consideration, for whenever the will of the legislature as

declared in a statute is opposed to the will of the people as declared in the Constitution, the former must yield and the latter prevail." (Emphasis is by the Court)

The Constitution was completely disregarded by the Legislature. Therefore, the referendum at the 1968 Primary was held without any valid statutory or constitutional authority, and the vote at the referendum should be declared to be a constitutional nullity.

Furthermore, the failure to give the electorate adequate notice of the actual contents of the proposals and adequate time to study them before casting their votes denied Due Process of Law to *all* of the people. In ordinary litigation, whether it be civil or criminal, Due Process of Law requires that a party be given full and specific notice of what he is called upon to meet, and adequate time to prepare to meet the issues. Are the people to be denied that same right, when asked to approve drastic changes in their fundamental law? What could affect the liberties and property of the people more directly?

The fact of the matter is, that the people were given no adequate knowledge of the matters they were voting upon. The proposals involved numerous complex and radical changes in legislative apportionment, debt limits, taxation, powers of local government, judiciary, etc. The full text of the proposals embraced tens of thousands of words. It was published only once and then, in most newspapers, in type so fine as to be almost impossible to read, even by a person blessed with the best of eyesight. When the voters went to the polls, only 18 days later, all that they had before them were five brief Ballot Questions, cryptic, laconic and affording little or no information of the true content of the proposals. The people were asked to vote blindly and to accept five "package deals" on blind faith, without any opportunity to separate the good from the bad.

To put the matter bluntly, the people were asked "to buy a pig in a poke." A referendum conducted in such fashion cannot possibly be reconciled with Due Process of Law.

Furthermore, the Ballot Questions plainly violated that portion of Article XI, Section 1, of the Pennsylvania Constitution which provides that:

> "When two or more amendments shall be submitted they shall be voted upon separately."

This language is clearly mandatory. It was not within the competence of the Legislature to direct or authorize the lumping of two or more amendments in a single Ballot Question. Yet, the Legislature, by Section 9(a) of the Act of 1967, No. 2, purported to authorize the Convention to frame one Ballot Question for each *Article,* regardless of the number and nature of the amendments contained in the Article.

Ballot Question No. 5, on the Judiciary, for example, flagrantly violated the above quoted constitutional provision. Ballot Question No. 5 showed upon its face that it was submitting no less than NINE separate categories of amendments:

1. Unified Judicial System;
2. Qualifications of Judges and Justices of the Peace;
3. Selections of Judges and Justices of the Peace;
4. Tenure of Judges and Justices of the Peace;
5. Removal of Judges and Justices of the Peace;
6. Discipline of Judges and Justices of the Peace;
7. Retirement of Judges and Justices of the Peace;

8. Prohibited Activities of Judges and Justices of the Peace;

9. "Related Matters" (not specified).

Furthermore, the Ballot Question did not give the voters even a hint that the Proposal would infringe on the jurisdiction of the Supreme Court; that it would change the jurisdiction of the Courts of Common Pleas; that it would abolish certain existing courts; or that it would set up a new state-wide Commonwealth Court.

No single one of the categories of amendments contained in the proposed Judiciary Article had any necessary relation to or dependence upon any other category. For example, a change in the organization or jurisdiction of the Courts is a matter entirely separate from the manner of selecting judges or the manner of removing, retiring or disciplining them. If a voter actually knew what he was voting upon, he might well have approved *some* of the changes made by the proposed Judiciary Article but be completely opposed to *others*. Yet, he was given no choice. He has to take "all or nothing," without any adequate information as to what he was voting upon. It is precisely this type of "package deal" which Article XI, Section 1, of the Pennsylvania Constitution forbids.

The questions raised by this appeal are still justiciable. The basic issue is whether the purported consent of the electorate was *validly* obtained. In *Armstrong v. King*, 281 Pa. 207, 217, your Honorable Court recognized that such an issue will survive the referendum:

> "(if) the alleged defects are so serious as to lead to a belief that the people were not properly advised * * * or at the polls a fair vote was not obtained."

Furthermore, the case involves Federal issues arising under the Due Process Clause and Equal Protection Clause of the 14th Amendment to the U. S. Constitution. No judge-made rule of "justiciability" by a State Court can prevent a determination of the questions whether the make-up of the Convention and the manner of submitting its proposals violated the Federal Constitution. This necessarily follows by reason of the Supremacy Clause of Article VI of the U. S. Constitution.

As stated in *Lucas v. Colorado General Assembly,* 377 U. S. 713, 12 L. ed. 2d 632:

> "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."

The appellants' challenge to the propriety of the procedure was made before the election was held. The people should not be denied their constitutional rights to be fully advised of the true nature and content of proposed constitutional changes merely because the court below erroneously refused to grant a preliminary injunction, or because this Court postponed review until after the election was over. Indeed, the Order of this Court, of April 18, 1968, declining immediate review, was expressly stated to be "without prejudice." The constitutional rights of the people can still be vindicated by this Court. Your Honorable Court has not hesitated to set aside a referendum where there was a material departure from the requirements of a valid *statute: Kittaning Country Club's Liquor License Case,* 330 Pa. 311, 318. You should not hesitate to set aside a referendum held in flagrant violation of the *Constitution,* and also in violation of the basic right of the people to Due Process of Law. Justice to the people and regard for their constitutional rights demands no less.

CONCLUSION.

For the foregoing reasons Your Honorable Court is requested:

(1) To declare the provisions of the Act of March 15, 1967, No. 2, relating to the time and period of publication and the time for conducting a referendum on the convention's proposals to be unconstitutional and void; and

(2) To declare the referendum held at the 1968 Primary to be in violation of the Constitution, void and of no effect.

Respectfully submitted,

W. J. KRENCEWICZ,
Attorney for Interested Person
Under Rule 65.

LINDSAY *v.* KELLEY, SECRETARY OF COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 1370. Decided June 23, 1969.

433 Pa. 406, 250 A. 2d 474, appeal dismissed and certiorari denied.

James E. Beasley for appellant.

William C. Sennett, Attorney General of Pennsylvania, and *Edward Friedman* for appellee.

Bernard G. Segal, Samuel D. Slade, and *Ralph S. Snyder* for the Pennsylvania Bar Assn. as *amicus curiae* in support of the motion to dismiss.

PER CURIAM.

The motion of the Pennsylvania Bar Association for leave to file a brief as *amicus curiae* is granted. The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.